Supreme Court, U.S.
FILED

95 • 288 AUG 2 1 1995

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BANK OF ISRAEL, MINISTRY OF FINANCE OF THE GOVERNMENT OF ISRAEL, MOSES MANDELBAUM, GALIA MAOR, and ZE'EV ABELES,

Petitioners,

vs.

NATHAN LEWIN, Esq.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JONATHAN J. LERNER
Counsel of Record
ANGELA G. GARCIA
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000

Attorneys for Petitioners

August 18, 1995

115 PP

QUESTION PRESENTED

Given the unequivocal language in Rule 11 of the Federal Rules of Civil Procedure and this Court's mandate that Rule 11 be construed according to its plain meaning, whether the policy consideration of encouraging individuals to file lawsuits justifies a judicial interpretation of Rule 11 that sharply departs from its text to permit the filing of a complaint for an improper purpose as long as the claims asserted are not found to be frivolous.

PARTIES TO THE PROCEEDING BELOW

The appellant in the Court of Appeals was Nathan Lewin, Esq., and the appellees were the Bank of Israel, the Ministry of Finance of the Government of Israel, Bank Hapoalim Ltd., Moses Mandelbaum, Galia Maor, and Ze'ev Abeles. Bank Hapoalim Ltd. is not a party to this petition for a writ of certiorari.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding Below ii

Table of Authorities v

Opinions Below 2

Jurisdiction 2

Pertinent Federal Rule 3

Statement of the Case 4

REASONS FOR GRANTING THE WRIT 20

THE COURT OF APPEALS' DECISION CONFLICTS WITH THE FIRST, FOURTH, SEVENTH, AND ELEVENTH CIRCUITS AND IGNORES THE MANDATE OF THIS COURT TO INTERPRET RULE 11 ACCORDING TO ITS PLAIN LANGUAGE 20

A. The First, Fourth, Seventh, and Eleventh Circuits Interpret Rule 11 as Providing for Two Separate and Independent Grounds for Sanctions 21

Page

B. This Court Has Mandated that Rule 11 Be Interpreted According to Its Plain Language 22

C. The Court of Appeals Erred in Interpreting the 1983 Amendments to Rule 11 as Completely Eliminating Any Subjective Inquiry 24

D. The Court of Appeals' Ruling that the Complaint Was Not Filed for an Improper Purpose Must Be Reversed Because It Is an Offshoot of the Court's Holding that a Nonfrivolous Complaint Cannot Be Filed for an Improper Purpose 27

CONCLUSION 28

TABLE OF AUTHORITIES

Cases *Page*

Brown v. Federation of State Medical Boards, 830 F.2d 1429 (7th Cir. 1987) 21

Burkhart Through Meeks v. Kinsley Bank, 852 F.2d 512 (10th Cir. 1988) 21-22

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533 (1991) 22, 23, 26

Cohen v. Virginia Electric and Power Co., 788 F.2d 247 (4th Cir. 1986) . . . 21

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 19, 22

Lancellotti v. Fay, 909 F.2d 15 (1st Cir. 1990). 21, 25

Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989) 24-25

National Association of Government Employees, Inc. v. National Federation of Federal Employees, 844 F.2d 216 (5th Cir. 1988) 22, 26

Cases *Page*

Patterson v. Aiken, 841 F.2d 386 (11th Cir. 1988) 21

Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) 22, 26

Szabo Food Service; Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988) 21

Townsend v. Holman Consulting Corp., 929 F.2d 1358 (9th Cir. 1990) 21

Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986) 25

Statutes *Page*

Fed. R. Civ. P. 9(b) 10, 13

Fed. R. Civ. P. 11 . . . . . 1, 3-4, *passim*

Fed. R. Civ. P. 12(b)(6) 10

Fed. R. Civ. P. 59(e) 14

28 U.S.C. § 1927 . . . . . 15, 18

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1330(a) 8

28 U.S.C. § 1332(a)(2) 8

Other Authorities *Page*

Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (1994) 23, 26, 27

Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11 -- Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L.J. 1313 (1986) . . . 25

Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. Rev. 723 (1994) 5

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BANK OF ISRAEL, MINISTRY OF FINANCE OF THE GOVERNMENT OF ISRAEL, MOSES MANDELBAUM, GALIA MAOR, and ZE'EV ABELES

Petitioners,

vs.

NATHAN LEWIN, Esq.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Bank of Israel, the Ministry of Finance of the Government of Israel, Moses Mandelbaum, Galia Maor, and Ze'ev Abeles respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, which reversed a judgment by the district judge (Charles S. Haight, J.), awarding sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-25a) is reported at 56 F.3d 450 (2d Cir. 1995). The opinion of the United States District Court for the Southern District of New York awarding sanctions (App. 26a-40a) is reported at 154 F.R.D. 68 (S.D.N.Y. 1994).

The district court's opinion dismissing the action on forum non conveniens grounds (App. 43a-70a) is reported at 801 F. Supp. 1068 (S.D.N.Y. 1992). The Court of Appeals' opinion affirming the dismissal (App. 74a-76a) is reported at 990 F.2d 71 (2d Cir. 1993).

JURISDICTION

The Court of Appeals entered its judgment on June 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT FEDERAL RULE

At the pertinent times of this action. Rule 11 of the Federal Rules of Civil Procedure prov.ded, in relevant part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading,

motion, or other paper, including a reasonable attorney's fee.[1]

STATEMENT OF THE CASE

This petition seeks review of a decision by the Court of Appeals for the Second Circuit reversing the district court's award of Rule 11 sanctions against Nathan Lewin, the attorney for plaintiffs in this action. In derogation of the unambiguous language of Rule 11, the Court of Appeals held, as a matter of law, that the filing of a complaint for an "improper purpose" cannot be sanctionable under Rule 11 if the claims asserted have not been found to be frivolous, even if the complaint is duplicative and is filed in a vexatiously inconvenient forum half-way around the world from where the underlying events occurred and where plaintiffs had lodged virtually identical claims.[2] (App. 21a-22a)

---

[1] In December 1993, after submission of defendants' motion for sanctions but prior to the issuance of the district court's decision, amendments to Rule 11 were adopted that made the imposition of sanctions discretionary upon the finding of a Rule 11 violation. The amendments did not affect the "improper purpose" clause of Rule 11.

[2] Although the Court of Appeals also professed to rule that the filing of the Complaint in this action was not improper, it made its ruling contingent on the Complaint not being found frivolous: "The district court held that the filing of the complaint with a view to exerting pressure on defendants through the generation of adverse and economically disadvantageous publicity reflected an improper purpose. *To the extent that a complaint is not held to lack foundation in law or fact, we disagree.*" (App. 22a) (Emphasis added.) Therefore, the ruling is a mere offshoot of the Court of Appeals' holding that a nonfrivolous complaint cannot be filed for an improper purpose.

This Court should grant certiorari in this case because the Court of Appeals' holding creates a sharp conflict with decisions from the First, Fourth, Seventh, and Eleventh Circuits and departs from the unambiguous text of Rule 11 in derogation of this Court's mandate that the rule be interpreted according to its plain language. Given the on-going national debate over the proper role of litigation,[3] this case provides a timely and rare opportunity for this Court to clarify, on a clear and undisputed factual record, the proper application of the "improper purpose" clause of Rule 11 and to resolve the split in the circuits.[4]

Background

The sanctions decision arises from a lawsuit filed in the Southern District of New York by plaintiffs Erwin Sussman and Ira Guilden[5] against Israeli

---

[3] See, e.g., Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. Rev. 723 (1994) (discussing generally public's perception that lawyers abuse the litigation process).

[4] The December 1993 amendments to Rule 11 did not affect the "improper purpose" clause, which retains its full force. Under the amended version, an attorney who signs a pleading still certifies that "it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

[5] Sussman is a Swedish citizen and permanent resident of California. (App. 43a) Guilden, who purportedly was a United States citizen and a resident of New York, is deceased. His claims were asserted in a representative capacity by his son, Paul Guilden. (App.43a-44a)

government agencies, present and former Israeli government officials, and an Israeli bank.[6]

Sussman and Guilden were founders, directors and shareholders of the failed North American Bank ("NAB"), an Israeli bank which collapsed in 1985 after years of fraud, embezzlement, and mismanagement by its senior managers in Israel. Certain NAB managers were subsequently tried and convicted on criminal charges.

In 1989, the Official Receiver, as liquidator of NAB, instituted a civil action in Israel (the "Israeli Action") against Sussman, Guilden, and other officers and directors of NAB. The Official Receiver's complaint alleged, *inter alia*, that the director defendants were liable for the losses of NAB for failing to act properly in accordance with Israeli banking regulations, for acting in a grossly negligent manner as directors, and for breach of fiduciary duty. In the Israeli Action, Sussman and Guilden asserted affirmative defenses raising factual and legal issues virtually identical to those they subsequently raised in this action. They also filed third-party claims in the Israeli Action against three of the defendants in this action that were virtually identical to claims asserted in this case.

---

[6] Defendant Bank of Israel ("BOI") is the central bank of Israel, responsible for Israel's monetary and foreign exchange policies and supervision of Israeli banking corporations. Defendant Ministry of Finance of the Government of Israel (the "Ministry") is the Israeli counterpart of the Treasury Department and the Office of Management and Budget in the United States. Defendant Bank Hapoalim B.M. is a banking corporation licensed and incorporated under Israeli law. Defendants Mandelbaum, Maor and Abeles were, at the relevant times, officials at the Bank of Israel.

Shortly before commencement of trial in Israel, Mr. Lewin, as counsel for Sussman and Lewin, sent identical letters to the Prime Minister of Israel, the Israeli Minister of Justice, the Israeli Minister of Finance, and the Governor of the Bank of Israel threatening to file a lawsuit in the United States unless the claims against Sussman and Guilden in Israel were dropped. These letters stated, in salient part:

> *This is a matter of extreme urgency because, in the absence of any satisfactory resolution of our differences, the lawsuit will be filed in New York within the next ten days.* The agencies of the Government of Israel that are engaged in an effort directed against our clients are also *pressing a trial in the Jerusalem District Court that is scheduled to begin shortly.*
>
> *If this controversy erupts into public view with the filing of our lawsuit* and the inception of the Israeli proceeding, it will not only result in a grave injustice to individuals who have been among Israel's most constant and generous supporters, *but will seriously damage foreign investment in Israel in the future.* (App. 38a) (Emphasis added.)

Thereafter, Mr. Lewin sent a copy of the draft complaint to Amihud Ben-Porath, a lawyer for the Bank of Israel, accompanied by a cover letter suggesting that "[m]aybe we can save both our clients much travail" by compromising the Israeli Action in order to avert an American action. (App. 30a) In response, Mr. Ben-Porath advised Mr. Lewin and his

clients that the threatened action would be regarded as "blackmail" and thus counterproductive. (App. 31a)

The Complaint

On June 17, 1991, on the eve of the Israeli trial, plaintiffs made good on their threats by filing this action in the Southern District of New York.[7] Mirroring claims plaintiffs had previously asserted in the Israeli Action, the Complaint here alleged that defendants had made oral misrepresentations to plaintiffs in Israel relating to the financial condition of NAB, and that in reliance on those misrepresentations, they invested in NAB and took positions on NAB's board of directors. Plaintiffs further alleged that in 1983, during the Israeli "Banking Shares Crisis," the Bank of Israel and the Ministry of Finance approved a "secret" $10 million loan to NAB to enable NAB's corrupt management to support the price of NAB shares.[8]

---

[7] Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1330(a), which applies to suits against instrumentalities of foreign states in the absence of foreign sovereignty, and under 28 U.S.C. § 1332(a)(2), which governs suits between a citizen of a state and a citizen of a foreign state. Certain defendants challenged the jurisdiction of the district court, but the dismissal of the case on forum non conveniens grounds made resolution of this issue unnecessary.

[8] In late September and early October 1983, during what became known as the Israeli "Banking Shares Crisis," most of Israel's banks decided to discontinue their previous practice of supporting the prices of their own shares, referred to in Hebrew as "*visut*." To avoid a collapse of NAB's shares, Sussman and other directors and shareholders of NAB lobbied the Governor of BOI and the Minister of Finance for a way to protect their shares. Bank Hapoalim

An analysis of the Complaint readily established that the case was quintessentially Israeli, and lacked any real nexus to New York. Among other things, all the crucial events underlying the claims occurred in Israel, the principal actors involved in the alleged "fraudulent scheme" were Israeli government officials, the witnesses and documents, which were in Hebrew, were located in Israel, and the factual issues raised in the Complaint were already the subject of extensive litigation in Israel both in the Israeli Action, in which plaintiffs asserted third-party claims against certain of the defendants in this action, and in the related criminal proceedings against the managers of NAB.

Given the lack of any real nexus between this action and New York, plaintiffs exaggerated the importance of the passage of the $10 million loan through the New York branch of Bank Hapoalim, claiming that the action "arises out of a commercial loan made in New York in October 1983 to the managers of NAB." (App. 56a) The documentary evidence, however, established that the loan was centered in Israel, where it was arranged, negotiated, and signed by NAB Holding. Bank Hapoalim made the loan through its New York branch for reasons relating to its own internal operations.

---

thereafter made a $10 million loan to North American Bank Holding Corporation ("NAB Holding"), a Luxembourg entity owned by principal shareholders of NAB. The loan funds were transferred through Bank Hapoalim's New York branch to an account of NAB Holding in Tel Aviv, and the proceeds were used to buy shares of NAB on the Tel Aviv Stock Exchange. The Israeli government also placed a $10 million time deposit on commercial terms with Bank Hapoalim. The government eventually withdrew the deposit, and several months thereafter, NAB Holding defaulted on its loan.

The Publicity

As threatened, after filing this action, Mr. Lewin orchestrated a publicity campaign. Echoing his previous threats to inflict "serious[] damage [to] foreign investment in Israel," Mr. Lewin was quoted in the October 31, 1991 edition of The New York Times as stating: "The message is that if you lend your name to anything in Israel, you can no longer be sure that some lawyer and court won't come after you with huge liabilities." (App. 32a) Mr. Lewin also acknowledged to the press that the action here was duplicative. For example, in the June 16, 1991 edition of The Jerusalem Post, Mr. Lewin was reported to have stated that "the case was being pursued in the U.S. *despite the fact that the matter has been addressed by the Israeli courts*, since [NAB's] foreign investors 'were very badly treated by the Israeli court system.'" (App. 31a) (Emphasis added.)

Defendants' Motion to Dismiss

Given the absence in the case of any *bona fide* connection to New York, all defendants moved to dismiss the Complaint based, *inter alia*, on forum non conveniens.[9] Simultaneously with the filing of the motion to dismiss, defendants urged plaintiffs' counsel, Mr. Lewin, in writing to withdraw the action

---

[9] In the alternative, all defendants moved to dismiss the action based on the statute of limitations and for failure to plead fraud with particularity pursuant to Fed. R. Civ. P. 9(b). Certain defendants also sought dismissal for lack of subject matter and personal jurisdiction, for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), and pursuant to the Foreign Sovereign Immunities Act and the Act of State Doctrine.

so as to avoid inflicting further financial harm because the uncontroverted evidence demonstrated that it was filed in an inappropriate forum for the improper purpose of harassing defendants. Defendants specifically reserved the right to seek sanctions.

Plaintiffs' Baseless Attacks on the Israeli Judiciary

Although they lacked any legitimate reason for bringing the action in New York, plaintiffs refused to withdraw the action. In their initial answering papers, plaintiffs claimed without providing any support whatsoever, that they would not receive a fair hearing in Israel because the "Israeli courts are subject to the influence of the government officials and agencies whom the plaintiffs are suing . . . ."

Defendants responded by submitting declarations from two experts on Israeli law attesting to the fairness and independence of the judiciary in Israel. Despite an extraordinary 90-day period that plaintiffs requested, and received, from Judge Haight to supply, after-the-fact, an evidentiary basis for their attacks on the integrity of the Israeli judiciary, plaintiffs were unable to substantiate their attacks or rebut the expert declarations submitted by defendants. Instead, plaintiffs were forced to concede that the Israeli court system generally dispenses fair and even-handed justice, and denied ever claiming otherwise.

But, rather than withdrawing the action, plaintiffs simply shifted to a new, equally contrived attack, arguing that Israeli courts were incapable of providing a fair hearing solely with respect to their particular

claims because of a certain "negative predisposition" in Israel. According to plaintiffs, this "negative predisposition" was created by a blue-ribbon report issued in 1986 (the "Beisky Report"), which plaintiffs claimed found that the Bank of Israel and other Israeli government officials did not engage in *visut* or any cover-up. Plaintiffs' belatedly contrived theory, however, fell prey to their own previous position in the Israeli Action, where they argued the exact opposite -- that the Beisky Report exonerated them.[10]

Judge Haight's Dismissal of the Action

United States District Judge Charles S. Haight dismissed the action, concluding that it was a "quintessential case for application of the forum non conveniens doctrine." (App. 69a)

In an extensive and well-reasoned opinion, Judge Haight rejected plaintiffs' contrived claim that the action arose out of a commercial loan made in New York: "Contrary to plaintiff's characterization, adopted for tactical purposes, it is far more accurate to say that this action arises out of alleged fraudulent

---

[10] In his answer to the Official Receiver's complaint, Guilden quoted two pages from the Beisky Report, and then stated:

> The above quotation from the Beisky Committee Report shows what part was played by the competent authorities, i.e., Bank of Israel and the Ministry of Finance, and this has the effect of annulling the part played by a foreign director who appointed a substitute, and who did not act in the whole field of manipulation of the Bank's shares and knew nothing about it.

acts and breaches of fiduciary duty occurring entirely in Israel." (App. 56a) The district court also rejected plaintiffs' claim that this action was not duplicative of the Israeli Action: "Notwithstanding plaintiffs' protestations to the contrary, examination of the pleadings shows that both plaintiffs' answers and third-party claims in the Israeli civil action contain allegations of fraud on the part of BOI and others that parallel their allegations at bar." (App. 48a n.2) Judge Haight did not reach the other alternative grounds for dismissal, but stated that if it were not for the forum non conveniens ground, he would dismiss the Complaint for failure to plead fraud with the specificity required by Fed. R. Civ. P. 9(b). (App. 61a)

Judge Haight gave extensive consideration to plaintiffs' far-fetched and shifting attacks on the integrity of the Israeli judiciary, and rejected them as completely unfounded. He noted that plaintiffs submitted no affidavits to support their initial "mass indictment of a democratic nation's system" and that "readers of newspapers are aware of the fact that Israeli courts are entirely capable of making judgments displeasing to those in high civil or military authority." (App. 64a-65a) Judge Haight found plaintiffs' belatedly contrived "negative predisposition" theory to be equally unfounded. Noting that plaintiffs' own legal expert specifically refrained from stating that "'any particular lower court in Israel will be adversely influenced' by the circumstances described in his affidavit" (App. 68a), Judge Haight concluded:

> I am not prepared to indulge the assumption that Israeli judges, if presented with

> plaintiffs' claims, would be so affected by a "negative predisposition" that they would fail faithfully to discharge the solemn duty that lies at the heart of the judicial office. (App. 66a)

Judge Haight dismissed the action with the following conditions: (i) that defendants waive any statute of limitations defense under Israeli law that may have arisen since commencement of the action; and (ii) "to address a concern expressed on behalf of Sussman on this motion," that Sussman receive written assurances from the appropriate Israeli authorities that he would not be detained if he were to travel to Israel to defend against related claims pending against him or to assert claims covered by the Complaint.[11] (App. 70a)

After defendants satisfied the conditions to the dismissal of the action, Judge Haight issued an order dismissing the Complaint.[12] (App. 71a-72a) The

---

[11] Despite the exhaustive briefing, plaintiffs' counsel moved under Fed. R. Civ. P. 59(e) to amend Judge Haight's decision conditionally dismissing the case. In direct violation of Local Rule 3(j), which applies to Rule 59(e) motions, plaintiffs' counsel filed a new factual declaration and merely repeated the exact same arguments he had already advanced in the underlying motion. In their response, defendants sought attorneys fees and costs they incurred in opposing the baseless motion.

[12] In a Memorandum dated March 8, 1993, Judge Haight stated that plaintiffs' motion to amend had been denied *sub silentio* by his September 9, 1992 order of dismissal. (App. 73a) Recognizing that defendants had made a request under Rule 11 for attorneys fees and costs they incurred in opposing the motion, Judge Haight stated that he would defer ruling on the request pending the outcome of plaintiffs' appeal. In determining to award sanctions against plaintiffs' counsel of $50,000, Judge Haight declined to award a

Court of Appeals for the Second Circuit affirmed the dismissal. (App. 74a-76a)

Defendants' Motion for Sanctions

Defendants then moved in the district court for an award of sanctions pursuant to Rule 11, 28 U.S.C. § 1927, and the court's inherent power. Defendants sought sanctions under Rule 11 based on two separate and independent grounds: (1) that plaintiffs filed the Complaint for the improper purpose of harassing defendants and coercing withdrawal of the claims pending against them in the Israeli Action; and (2) that certain arguments advanced by plaintiffs in their papers opposing dismissal, including their attacks on the integrity of the Israeli judiciary and numerous claims made in the Complaint, were not well grounded in fact or in law.[13]

The District Court's Award of Sanctions

On March 29, 1994, the district court issued a written decision awarding sanctions under Rule 11 and the court's inherent power only against plaintiffs' counsel, Mr. Lewin, based solely on its finding that the Complaint was filed for an improper purpose.

---

separate sanction based on the motion to amend. (App. 36a n.3)

[13] Defendants' request for sanctions under § 1927 and the court's inherent power was based on the conduct of plaintiffs and their counsel in proliferating and prolonging the litigation by filing a duplicative action in an inconvenient forum and by persisting in meritless arguments long after it became evident that the action should be dismissed on forum non conveniens grounds.

(App. 27a) Judge Haight held that "the filing of a complaint in a highly doubtful venue, for the express purpose of putting pressure on a foreign government to drop or compromise that government's action against the plaintiffs in the foreign nation's courts, furnishes a stark example of improper and oppressive litigation." (App. 33a)

In his decision, Judge Haight effectively incorporated the findings of his own prior decision and the decision of the Court of Appeals, stating at the outset of his decision that "[f]amiliarity with those opinions is assumed." (App. 27a) Applying the "improper purpose" clause of Rule 11, Judge Haight determined that sanctions were appropriate based "upon the manifestly improper purpose which played a significant part in plaintiffs' motivation for filing their complaint." (App. 27a) This purpose "was to pressure the Israeli Government to cease prosecution of the Jerusalem action against them by threatening to file, and eventually filing, a sensational complaint against the Government in New York." (App. 33a)

Judge Haight carefully analyzed the letters sent by Mr. Lewin to various Israeli government officials and concluded:

> The message sought to be conveyed by these letters is crystal clear: drop the Jerusalem action against Sussman and Guilden, or they will sue the Israeli Government for fraud in New York, and the attendant publicity will cause economic damage to Israel. That constitutes abuse of the litigation process. (App. 30a)

In making this factual finding, the district court considered, and specifically rejected, the benign interpretation proffered by Mr. Lewin: "I am not persuaded by the quite different interpretations plaintiffs and their counsel seek to place upon counsel's words." (App. 30a) It bears emphasis that Judge Haight did not sanction Mr. Lewin for writing the letters. Judge Haight expressly recognized that Mr. Lewin's letters are not pleadings and are not subject to Rule 11. He correctly found, however, that they "furnish powerful evidence of the improper purpose for which this complaint was filed." (App. 30a)

As further evidence of plaintiffs' improper purpose, Judge Haight noted that Mr. Lewin's letters "contained the prediction (to state it charitably) that commencement of the New York litigation would result in publicity adverse to Israel," and that the prediction "came to pass with Mr. Lewin as a participant." (App. 31a) Additionally, Judge Haight noted that Mr. Lewin had referred to the "travail" that would be engendered by this threatened action. (App. 30a)

Judge Haight described the Rule 11 violation as "serious," and stated: "In the view I take of the case, I would impose sanctions in the exercise of my discretion, even if they were not mandated." (App. 32a n.1) Nevertheless, stating that his "purpose is to deter, not to fully compensate," Judge Haight limited the amount of the award against Mr. Lewin to $50,000 without explaining how he determined that this amount would

be sufficient to "deter."[14] (App. 36a) Judge Haight did not award sanctions against plaintiffs Sussman and Guilden, nor did he reach defendants' request for sanctions based on baseless arguments made by plaintiffs in their papers opposing dismissal, including the attacks on the Israeli judiciary.[15] (App. 36a n.3)

The Court of Appeals' Decision on Rule 11

On appeal, the Court of Appeals for the Second Circuit reversed the award of sanctions, holding that a complaint that is filed for an improper purpose is not sanctionable under Rule 11 as long as it is not found to be frivolous. (App. 3a) The Court of Appeals expressly acknowledged that the circuits were split on this important issue: "The courts have expressed somewhat divergent views as to whether an improper purpose can warrant the imposition of sanctions for a nonfrivolous filing." (App. 20a) Nonetheless, despite the unambiguous wording of Rule 11, which authorizes the imposition of sanctions if a pleading is interposed for "any improper purpose" and the factual determination by the district judge that such an

---

[14] The district court declined to make an additional award based on plaintiffs' sanctionable violation of Local Rule 3(j) in filing their motion to amend the court's July 17, 1992 decision. (App. 36a n.3)

[15] The district court also refused to award sanctions under § 1927, stating that this statute was inapplicable to plaintiffs' filing of this action, even if the action was duplicative of claims raised in the Israeli Action, because plaintiffs were defendants, not plaintiffs, in the Israeli Action. (App. 34a) It did not address defendants' request for sanctions under § 1927 and the court's inherent power based on the conduct of plaintiffs and their counsel in pursuing frivolous arguments long after it became evident that the action would be dismissed on forum non conveniens grounds.

improper purpose had played a "significant part" in plaintiffs' motivation for filing the Complaint, the Court of Appeals concluded that "[a] party should not be penalized for or deterred from seeking and obtaining warranted judicial relief merely because one of his multiple purposes in seeking that relief may have been improper." (App. 21a-22a)

The Court of Appeals further disagreed with the district court's findings that the filing of the Complaint in this action was for an improper purpose. (App. 22a) Without citing a single authority and without paying the slightest deference to the contrary finding of the district judge,[16] the Court of Appeals held that to the extent that a complaint is not found to be frivolous, no improper purpose could be attributed to the filing of the complaint intended to exert pressure on defendants, through the resulting collateral economic harm to investment in Israel and adverse publicity, to desist from pursuing a case in its natural venue. (App. 22a) It also held, as a matter of law, that if nonfrivolous litigation is eventually commenced, no improper purpose is demonstrated by the sending of letters by counsel to an adversary threatening to file an action in New York, no matter how inconvenient and repetitive, unless the claims against his clients in a foreign forum were dropped. (App. 22a) The Court of Appeals did not reach or ad-

---

[16] In failing to give any deference to the district court's findings, the Court of Appeals failed to heed this Court's mandate that all aspects of the district court's award of sanctions are to be reviewed under an abuse of discretion standard. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

dress plaintiffs' unsubstantiated attacks on the Israeli judiciary as a separate grounds for sanctions.[17]

REASONS FOR GRANTING THE PETITION

THE COURT OF APPEALS' DECISION CONFLICTS WITH THE FIRST, FOURTH, SEVENTH, AND ELEVENTH CIRCUITS AND IGNORES THE MANDATE OF THIS COURT TO INTERPRET RULE 11 ACCORDING TO ITS PLAIN LANGUAGE

This Court should grant certiorari in this case because the Court of Appeals' decision ignores this Court's admonition to interpret Rule 11 according to its plain language and creates a conflict with decisions from the First, Fourth, Seventh, and Eleventh Circuits. As the Court of Appeals itself recognized, courts have expressed "divergent views as to whether an improper purpose can warrant the imposition of sanctions for a nonfrivolous filing." (App. 20a) This case presents an unusual opportunity for this Court to resolve, on a clear undisputed factual record, the conflict in the circuits and to provide guidance concerning the meaning and application of the "improper purpose" clause contained in Rule 11.[18]

---

[17] Accordingly, the Court of Appeals failed to make a determination on whether the district court, after having found that plaintiffs' attacks on the Israeli judiciary had no scintilla of factual support, abused its discretion by not awarding sanctions based on these attacks.

[18] The December 1993 amendment to Rule 11 does not affect the issue before this Court since under the amended version, the "improper purpose" clause of Rule 11 retains its full force and effect.

A. The First, Fourth, Seventh, and Eleventh Circuits Interpret Rule 11 As Providing for Two Separate and Independent Grounds for Sanctions

Consistent with the plain language of Rule 11, the First, Fourth, Seventh, and Eleventh Circuits have all expressed the view that complaints filed for an improper purpose violate Rule 11 even if the substantive claims asserted are not found to be frivolous. In *Lancellotti v. Fay*, 909 F.2d 15 (1st Cir. 1990), the First Circuit stated that Rule 11 "contains not one, but two, grounds for sanctions: the 'reasonable inquiry' clause and the 'improper purpose' clause." *Id.* at 19 (citations and footnote omitted). Similarly, in *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988), the Seventh Circuit stated that "filing a colorable suit for the purpose of imposing expense on the defendant rather than for the purpose of winning" would be sanctionable under Rule 11. *Id. at 1083. See also Brown v. Federation of State Medical Bds.*, 830 F.2d 1429, 1436 (7th Cir. 1987); *Patterson v. Aiken*, 841 F.2d 386, 387 (11th Cir. 1988); *Cohen v. Virginia Elec. and Power Co.*, 788 F.2d 247, 249 (4th Cir. 1986).

In reaching its holding, the Court of Appeals relied on decisions from the Fifth, Ninth, and Tenth Circuits, which have held that the public policy of encouraging individuals to file legitimate complaints justifies creating a judicial exception to the express terms of Rule 11 for complaints. *See Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990); *Burkhart Through Meeks v. Kinsley Bank*,

852 F.2d 512, 515 (10th Cir. 1988); *National Ass'n of Gov't Employees, Inc. v. National Fed'n of Fed. Employees*, 844 F.2d 216, 224 (5th Cir. 1988). Granting certiorari in this case will provide this Court with the opportunity resolve the conflict in the circuits and provide guidance on the proper interpretation of the "improper purpose" clause of Rule 11.

B. This Court Has Mandated that Rule 11 Be Interpreted According to its Plain Language

This Court has unequivocally mandated that Rule 11 be construed according to its plain language. *See Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 540-41 (1991) ("our inquiry is complete if we find the text of [Rule 11] to be clear and unambiguous"); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 391 (1990) (interpreting Rule 11 "according to its plain meaning"). Indeed, in *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989), this Court squarely rejected the argument that policy interests could ever justify deviating from Rule 11's plain language:

> Even if it were entirely certain that liability on the part of the firm would more effectively achieve the purposes of the Rule, we would not feel free to pursue that objective at the expense of a textual interpretation as unnatural as we have described. *Our task is to apply the text, not to improve upon it.*

Pavelic, 493 U.S. at 126 (emphasis added).

Similarly, in *Business Guides*, this Court held that the policy goals of Rule 11 outweigh any incidental effect a plain reading of Rule 11 may have on the substantive rights of litigants. 498 U.S. at 552. It stated: "There is little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental." *Id.*

Given the unequivocal mandate from this Court, the Second Circuit's interpretation of Rule 11 is indefensible. On its face, Rule 11 unambiguously provides for two separate and independent grounds for awarding sanctions. It states that an attorney who signs a pleading certifies that the pleading is "well grounded in fact and warranted by existing law . . . *and* that it is not interposed for *any improper purpose*." Fed. R. Civ. P. 11 (emphasis added). Accordingly, by the plain terms of Rule 11, the "improper purpose" clause imposes an obligation separate and independent from the obligation imposed by the "reasonable inquiry" clause. *See generally* Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 13(c), at 221 (1994) (the "prevailing, and better, view" is that the filing of a nonfrivolous pleading for an improper purpose violates Rule 11 "because it alone comports with the language of the Rule").

This Court of Appeals' departure from the plain language of Rule 11 in derogation of this Court's mandate makes this case worthy of certiorari.

C. The Court of Appeals Erred in Interpreting the 1983 Amendments to Rule 11 as Completely Eliminating Any Subjective Inquiry

The Court of Appeals' decision was based, in part, on its interpretation of the 1983 amendments to Rule 11 as eliminating any subjective component in the determination of sanctionable conduct. This interpretation of Rule 11 is in conflict with decisions from other circuits and distorts the purpose of the amendments, which was to eliminate the need to show subjective bad faith as a basis for sanctions, and not to eliminate sanctions where subjective bad faith is present.

Indeed, before the 1983 amendments, Rule 11 sanctions could be imposed only upon a showing of bad faith. As other circuits have recognized, the 1983 amendments added an objective standard of reasonableness to the Rule 11 inquiry for the purpose of eliminating the "empty head, pure heart" defense, not to immunize bad faith conduct from sanctions. In *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989), the Seventh Circuit aptly stated:

> *[Rule 11] has both a subjective and an objective component. A paper "interposed for any improper purpose" is sanctionable whether or not it is supported by the facts and the law, and no matter how careful the pre-filing investigation.* The objective component is that a paper filed in the best of faith, by a lawyer convinced of the justice of his client's cause, is sanctionable if counsel neglected to make "reasonable inquiry" beforehand. This

> objective component is the big change in the 1983 amendment to Rule 11. "An empty head but a pure heart is no defense. The Rule requires counsel to read and consider before litigating."

Id. at 931-32 (emphasis added) (citation omitted). Similarly, in *Lancellotti v. Fay*, 909 F.2d 15, (1st Cir. 1990), the First Circuit stated, "While bad faith remains sanctionable, it is now not a *sine qua non* to a Rule 11 impost." *Id.* at 19. *See also* Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11 -- Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L.J. 1313, 1320 (1986) ("Although courts and commentators have stressed that rule 11 introduces an objective standard to measure a lawyer's conduct, it is more accurate to say that the rule adds an objective layer to the subjective core of traditionally sanctionable bad faith conduct.") (footnote omitted).

The circuits which have interpreted the 1983 amendments as totally eliminating the subjective component from Rule 11 inquiry have reached a conclusion that is inconsistent with the language of the rule and undermines the salutary purpose of both the amendments and Rule 11 itself. Absent any subjective component to the Rule 11 inquiry, the filing of any paper -- a complaint or a motion -- cannot possibly be sanctionable as long as it is well grounded in law or in fact. Ironically, the same circuits that would eliminate any subjective inquiry into the purpose for filing a complaint have recognized that the filing for an improper purpose of a *motion* (as opposed to a complaint) is sanctionable under Rule 11 regardless of its possible merit. *See, e.g., Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 n.10 (9th Cir. 1986);

National Ass'n of Gov't Employees, 844 F.2d 216, 224 (5th Cir. 1988). This distinction between a complaint and a motion is legally untenable. As stated by one legal scholar, "There is no reason why a harassing complaint should be exempt from sanction when the next paper signed in the case clearly is not." Joseph, *Sanctions* § 14(A)(3), at 225.

In the final analysis, a departure from the plain language of Rule 11 forbidding the filing of a complaint for an improper purpose cannot be justified by the new objective standard which the 1983 amendments added to the traditionally subjective inquiry of Rule 11. Rather, if courts are to create a judicial exception to the express terms of Rule 11 for complaints, it could only be because these courts have determined that the policy consideration of encouraging individuals to file complaints justifies a judicial "improvement" of Rule 11 at the expense of its text. This is precisely the kind of policy consideration that this Court has held cannot justify a departure from the plain language of Rule 11. *See Business Guides*, 498 U.S. at 552; *Pavelic*, 493 U.S. at 126.

This case presents a rare opportunity to eliminate the confusion concerning the proper standard to be applied in the Rule 11 inquiry. Accordingly, this Court should grant certiorari in this case.

D. The Court of Appeals' Ruling that the Complaint Was Not Filed for an Improper Purpose Must Be Reversed Because It Is an Offshoot of the Court's Holding that a Nonfrivolous Complaint Cannot Be Filed for an Improper Purpose

Having held that the filing of a Complaint for an improper purpose is not sanctionable as long as the claims asserted are not frivolous, the Court of Appeals professed to then make the separate determination that Mr. Lewin's purpose in filing of the Complaint in this action was not improper. (App. 22a) In fact, however, the Court of Appeals ruled that the Complaint was not filed for an improper purpose only to the extent that the Complaint was not found to be frivolous: "The district court held that the filing of the complaint with a view to exerting pressure on defendants through the generation of adverse and economically disadvantageous publicity reflected an improper purpose. *To the extent that a complaint is not held to lack foundation in law or fact, we disagree.*" (App. 22a) (Emphasis added.) Therefore, the ruling is a mere offshoot of the Court of Appeals' holding that a nonfrivolous complaint cannot be filed for an improper purpose, and cannot be deemed to be a holding in its own right. *See* Joseph, *Sanctions* § 4(A)(3) at 225 (noting that application of improper purpose analysis becomes irrelevant where complaint is frivolous since signer has already violated Rule 11 by filing frivolous complaint). Accordingly, if this Court holds that the improper purpose clause provides a separate and independent ground for imposing sanctions under Rule 11, it must reverse the Court of Appeals' ruling that the filing of the Complaint in this action was not for an improper purpose.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the Court of Appeals' decision reversing the district court's award of sanctions under Rule 11.

Respectfully submitted,

Jonathan J. Lerner
Counsel of Record
Angela G. Garcia
Skadden, Arps, Slate,
Meagher & Flom
919 Third Avenue
New York, New York 10022
(212) 735-3000

Attorneys for Petitioners

August 18, 1995

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1034, 1035—August Term, 1994

(Argued: February 9, 1995 Decided: June 2, 1995)

Docket Nos. 94-7437, -7481

ERWIN SUSSMAN, and IRA GUILDEN, deceased, by & through Paul Guilden, his personal representative,

Plaintiffs,

NATHAN LEWIN, Esq.,

Appellant-Cross-Appellee,

—v.—

BANK OF ISRAEL, MINISTRY OF FINANCE OF THE GOVERNMENT OF ISRAEL, BANK HAPOALIM LTD., MOSES MANDELBAUM, GALIA MAOR, ZEEV EVELES, and JOHN DOES, 1-5,

Defendants-Appellees-Cross-Appellants.

Before:

OAKES, KEARSE, and CABRANES,

Circuit Judges.

Appeal from so much of a judgment of the United States District Court for the Southern District of New York, Charles S. Haight, Jr., *Judge*, as imposed a $50,000 sanction on plaintiffs' attorney pursuant to Fed. R. Civ. P. 11 and the court's inherent power, on the ground that a purpose of filing the complaint was improper. *See* 154 F.R.D 68 (1994). Cross-appeal for higher sanctions.

Reversed on the appeal; cross-appeal dismissed.

KENNETH W. STARR, Washington, D.C. (Alex M. Azar II, Christopher Landau, Kirkland & Ellis, Washington, D.C.; Herbert J. Miller, Jr., Miller, Cassidy, Larroca & Lewin, Washington, D.C., on the brief), *for Appellant-Cross-Appellee*.

JONATHAN J. LERNER, New York, New York (Angela G. Garcia, Skadden, Arps, Slate, Meagher & Flom, New York, New York, on the brief), *for Defendants-Appellees-Cross-Appellants*.

KEARSE, *Circuit Judge*:

Nathan Lewin, Esq., an attorney for the plaintiffs herein whose complaint was dismissed on the ground of forum non conveniens, appeals from so much of a judgment of the United States District Court for the Southern District of New York, Charles S. Haight, Jr., *Judge*, as

imposed a $50,000 sanction against Lewin pursuant to Fed. R. Civ. P. 11 and the court's inherent power on the ground that the complaint, signed by Lewin, had been filed in part for an improper purpose. The court held that, although plaintiffs were also motivated in part by a proper purpose, the presence of an improper purpose warranted the imposition of sanctions. On appeal, Lewin contends principally (1) that the criticized purpose was not improper, and (2) that sanctions could not properly be imposed because the claims asserted in the complaint were not frivolous. Defendants cross-appeal, contending that the sanctions should have been more severe. For the reasons that follow, we agree with Lewin that the award of sanctions was an abuse of discretion. We therefore reverse the judgment and dismiss the cross-appeal.

I. BACKGROUND

For the purposes of this appeal, the events are not in dispute. The plaintiffs are Erwin Sussman and the estate of Ira Guilden (Guilden and/or the estate referred to as "Guilden"), who died in 1984. Sussman, a Swedish citizen who lives in the United States, and Guilden, a United States citizen who resided in New York, were founders, directors, and shareholders of North American Bank Ltd. ("NAB"), an Israeli bank. Defendants are the Bank of Israel ("BOI"), which insured deposits in Israeli banks, and several other Israeli entities and individuals.

A. *The Collapse of NAB and the Litigation in Israel*

In 1985, NAB collapsed after years of fraud, embezzlement, and mismanagement by its senior managers in Israel. BOI made payments to NAB depositors and obtained the appointment of the Official Receiver of the

State of Israel (the "Receiver") to liquidate NAB's remaining assets. In 1989, the Receiver commenced a civil action in Israel in the name of the State of Israel (the "Israeli action"), naming as defendants Sussman, Guilden, and several other officers and directors of NAB, and alleging, *inter alia*, that the NAB directors had been negligent and had breached their fiduciary duties by failing to monitor adequately the management of NAB and to ensure that NAB operated in compliance with Israeli banking regulations. The Receiver's complaint sought recovery from the defendants, jointly and severally, of more than $100 million dollars to compensate for losses allegedly incurred by BOI as a result of NAB's collapse.

Sussman and Guilden, represented by Israeli counsel, raised affirmative defenses to the Receiver's claims and asserted third-party claims against BOI and two of its officials. In addition to alleging that BOI and the officials had been negligent in failing to carry out their supervisory duties with respect to NAB, the third-party claims alleged that BOI and the officials had deliberately misrepresented NAB's financial condition and concealed from NAB's non-Israeli directors certain financial transactions stemming from a 1983 banking scandal in Israel, which came to be known as the "Bank Shares Crisis" following revelations that many Israeli banks were artificially and unlawfully inflating the market prices of their respective shares. The third-party claims alleged that BOI and the Israeli Ministry of Finance (the "Ministry") had sought to avert the financial collapse of NAB by extending it a secret $10 million loan in order to allow NAB's senior managers to continue their manipulation of NAB's stock price; that the third-party-defendant officials, despite learning of the NAB managers'

improper activities, had continued to misrepresent NAB's situation to its nonresident directors and sought to prevent public disclosure of BOI's role in the NAB stock-manipulation scheme; and that NAB would not have collapsed but for the actions of BOI and the defendant officials. Sussman and Guilden sought contribution and indemnification for any amounts that they might be required to pay in the Israeli action.

B. *The Preparation and Filing of the New York Complaint*

Thereafter, Sussman and Guilden retained Lewin, a partner in the Washington, D.C. law firm of Miller, Cassidy, Larroca & Lewin, to investigate the circumstances underlying the Israeli suit and to evaluate the prospects for further litigation against BOI and other Israeli officials involved in the events at NAB. In 1991, as the Israeli action was nearing its scheduled trial date, Lewin drafted a complaint to be filed in New York (the "New York complaint"), naming as defendants BOI; the Ministry; three BOI officials, including the two named as third-party defendants in the Israeli action; and Bank Hapoalim, Ltd. ("Bank Hapoalim"), an Israeli bank with a branch office in New York.

The New York complaint substantially repeated Sussman and Guilden's assertions in the Israeli action that BOI and its officials had helped NAB managers to manipulate the price of NAB stock following the Bank Shares Crisis. It also alleged that the secrecy of the scheme was maintained by routing the Ministry's clandestine $10 million loan to NAB through Bank Hapoalim's New York office; that BOI and Ministry officials contemporaneously assured Sussman that NAB was well-managed and financially stable, thereby inducing

him not to sell his NAB shares; that BOI knew that the directorships held by NAB's foreign investors were largely honorary and that the investors were relying on BOI to monitor NAB's Israeli operations; and that Sussman and Guilden had relied on the representations of BOI and the Ministry in not taking action to protect their investments. The complaint also alleged that the filing of the Israeli action was itself part of BOI's continuing scheme to force Sussman and Guilden to bear the costs of BOI's failure to rectify the fraud and mismanagement at NAB. Sussman and Guilden sought, *inter alia*, damages totaling $17 million for the lost value of their investments in NAB.

Before filing the complaint, Lewin sent identical letters dated May 30, 1991 (the "May 1991 warning letter"), to several Israeli government officials, including then-Prime Minister Yitzchak Shamir, then-Minister of Finance Yitzchak Moda'i, and BOI Governor Michael Bruno, warning them of Sussman and Guilden's intention to bring the present suit, and proposing settlement discussions. After describing the general nature of the charges contained in the draft complaint, the letter stated:

> This is a matter of extreme urgency because, in the absence of any satisfactory resolution of our differences, the lawsuit will be filed in New York within the next ten days. The agencies of the Government of Israel that are engaged in an effort directed against our clients are also pressing a trial in the Jerusalem District Court that is scheduled to begin shortly.
>
> If this controversy erupts into public view with the filing of our lawsuit and the inception of the

> Israeli proceeding, it will not only result in a grave injustice to individuals who have been among Israel's most constant and generous supporters, but will seriously damage foreign investment in Israel in the future.

(May 1991 warning letter at 1.) The letter further asserted that Sussman and Guilden "were, at most, honorary directors of [NAB]" (*id.*), and that they had had no involvement in the improper activities of NAB's managers and had "relied on [BOI] and its inspectors to supervise [NAB] and to insure that its business was run properly" (*id.* at 2). It then concluded:

> The case now pending in Jerusalem is the culmination of years in which improprieties at North American Bank were overlooked or deliberately ignored by the Bank of Israel. It is grossly unjust for the Bank of Israel now to shift the blame for its own conduct to individuals who have always supported Israel emotionally and financially and seek to hold these foreign supporters liable, in an amount exceeding 200 million *shekalim*, for the losses caused by the failure of [NAB].
>
> In addition to the loss of their investments, which amounted to millions of dollars, our clients estimate that they have been forced to spend in excess of one million dollars fighting baseless claims made in the Israeli courts. Our lawsuit in federal court in New York will seek recovery against the Ministry of Finance, the Bank of Israel and individual government officials for these losses and for other harm caused to our clients.
>
> Our clients have heretofore been reluctant to take the step of filing suit because a full airing of this

> outrageous conduct by the Government of Israel will surely deter many potential foreign investors who might otherwise be interested in lending financial resources to Israel. However, the enormity of this injustice and the relentless prosecution of the case in Jerusalem leaves them no option.
>
> If you believe that discussions on this subject can lead to a fruitful and mutually satisfactory resolution, I am prepared to come to Jerusalem promptly to meet with you.

(*Id.* at 2-3 (italics in original).)

In response to the letter, Amihud Ben-Porath, an Israeli attorney representing BOI, telephoned Lewin and requested a copy of the draft complaint. Lewin sent a copy with a June 3, 1991 covering letter (the "June 1991 letter") stating, "I have not, in our conversation, overstated my clients' anger at how shabbily they have been treated in Israel, and I hope you appreciate it and are able to communicate this feeling. . . Maybe we can save both our clients much travail." Ben-Porath thereafter met with Lewin, Sussman, and Guilden in New York and talked with Lewin several times by telephone. After Ben-Porath advised Lewin that Israeli officials were unwilling to settle the dispute and withdraw the Israeli action, Lewin filed the New York complaint on June 17, 1991.

C. *The District Court Proceedings*

1. *The Dismissal of the New York Complaint*

In lieu of an answer, BOI moved to dismiss the New York complaint on numerous substantive and procedural grounds, but principally argued the ground of forum non conveniens. In opposition to the forum non conveniens

motion, plaintiffs argued, *inter alia*, that some evidence available to them in the New York action, including Sussman's own testimony, would be unavailable in Israel. They stated that Sussman could not travel to Israel to testify without the risk of being detained there by the Israeli government; Sussman stated in an affidavit that his prior requests of defendants and other Israeli government officials for a guarantee of safe passage into and out of Israel for that purpose had been denied.

In an opinion reported at 801 F. Supp. 1068 (1992), *aff'd* 990 F.2d 71 (2d Cir. 1993) (per curiam), the district court dismissed on the forum non conveniens ground. While acknowledging that the forum preferences of Sussman, a United States resident, and Guilden, a deceased American citizen whose estate was being administered in New York, were entitled to some degree of deference, the court held that other factors pointed to Israel as the more appropriate forum. It noted principally that all of the claims in the New York complaint would be governed by Israeli law; that Sussman and Guilden had voluntarily elected to invest in Israel; and that parallel litigation arising out of the same alleged conduct was already proceeding there. The court rejected Sussman and Guilden's contention that their claims arose out of the alleged secret $10 million loan transmitted through Bank Hapoalim's branch in New York, concluding that the New York conduct "cannot be regarded, in the overall scheme of things, as other than peripheral" to alleged acts and omissions "occurring entirely in Israel." 801 F. Supp. at 1074. The court also rejected the contention that an Israeli court would be predisposed against Sussman and Guilden's claims. It concluded that, in light of the complexity of the case and the interests of international comity, the claims in the New York com-

plaint presented "a quintessential case for application of the forum non conveniens doctrine." *Id.* at 1079. The court did not otherwise address the substance of Sussman and Guilden's allegations; rather, it conditionally dismissed the New York complaint "without prejudice to the merits of plaintiff[s'] claims." *Id.*

The court imposed two conditions on the grant of dismissal. First, it required defendants to waive any statute-of-limitations defense under Israeli law that might have become available after the commencement of the New York action. Second, the court required the Israeli government to provide Sussman with "written assurances" that he would not be detained in Israel should he travel there for the purpose of defending the Israeli action or of asserting claims covered by the New York complaint. *Id.* Defendants complied with the court's conditions, and the complaint was dismissed. An appeal by Sussman and Guilden from the dismissal was rejected in a per curiam opinion. *See* 990 F.2d 71.

2. *The Rule 11 Motion and the Sanctions Award*

Following this Court's affirmance of the forum non conveniens dismissal, BOI moved in the district court for an award of sanctions pursuant to Fed. R. Civ. P. 11, 18 U.S.C. § 1927 (1988), and the court's inherent power. They argued (a) that the New York lawsuit had been instituted for an "improper purpose," and (b) that the New York complaint and other papers filed by Sussman and Guilden "contained numerous arguments lacking factual and legal basis."

In an opinion reported at 154 F.R.D. 68 (1994), the district court granted the motion to the extent of imposing sanctions of $50,000 against Lewin pursuant to Rule 11 and the court's "inherent power to deal with abusive

litigation." 154 F.R.D. at 69. The court declined to rule on BOI's contention that the allegations of the complaint were unsubstantiated, noting that it "did not reach the merits in dismissing the complaint on forum non conveniens [grounds], and declin[ing] to expend more judicial resources in exploring them now." *Id.* at 72 n.3. Rather, it imposed its sanctions "based solely," *id.*, on what the court described as "the manifestly improper purpose which played a significant part in plaintiffs' motivation for filing their complaint," *id.* at 69.

In finding an improper purpose, the court quoted extensively from Lewin's May 1991 warning letter and his June 1991 letter to Ben-Porath and found that they were designed to force the withdrawal of the Israeli action by threatening the Israeli government with negative publicity that would result in "economic damage to Israel." *Id.* at 69. While acknowledging that Rule 11 sanctions may be imposed only for an abusive "pleading, motion, or other paper," *see* Fed. R. Civ. P. 11, and that prelitigation letters do not fall within the scope of the Rule, the court stated that Lewin's strategy constituted an "abuse of the litigation process," and that the letters provided "powerful evidence of the improper purpose for which th[e New York] complaint was filed." 154 F.R.D. at 69. In addition, the court found that Lewin's "prediction" of adverse publicity "came to pass with Mr. Lewin as a participant." *Id.* at 70. The court cited an article in the June 18, 1991 edition of the *Jerusalem Post*, quoting Lewin as saying that NAB's foreign investors " 'were very badly treated by the Israeli court system,' " *id.*, and an October 31, 1991 *New York Times* article quoting Lewin as saying, " 'The message is that if you lend your name to anything in Israel, you can no longer

be sure that some lawyer and court won't come after you with huge liabilities.' " *Id.* The district court stated that

> the filing of a complaint in a highly doubtful venue, for the express purpose of putting pressure on a foreign government to drop or compromise that government's action against the plaintiffs in the foreign nation's courts, furnishes a stark example of improper and oppressive litigation. That proposition seems to me self-evident. I see no need to discuss the many cases cited in the voluminous briefs on this motion. The issue is intensely fact-oriented.
>
> Plaintiffs protest that their purpose in filing the complaint was to secure an American forum for their fraud claims against defendants. They say the purity and fixity of their purpose should be inferred from the vigor with which they litigated their right to do so in this Court and the Court of Appeals. I accept that plaintiffs were also motivated by their forum preference, and that they did not go gently from it. It is commonplace, however, that the law recognizes multiple motives in human behavior. In this case plaintiffs had two motives. One was to pressure the Israeli Government to cease prosecution of the Jerusalem action against them by threatening to file, and eventually filing, a sensational complaint against the Government in New York. The other motive was to obtain American jurisdiction if the threats failed, as in fact they did. The conduct inspired by the first motive was improper.

Id. at 70-71.

After noting that the decision as to where an action is to be filed is "essentially a legal decision" typically made by a plaintiff's attorney, *id.* at 71, the court

declined to sanction plaintiffs themselves and imposed the sanctions solely against Lewin. The court also indicated that the amount of the sanction was not intended to compensate defendants for the expense of defending the action in New York but rather was meant to deter similar filings.

Lewin has appealed the award of sanctions. Defendants have cross-appealed, contending that the amount of the award should have been higher.

II. DISCUSSION

On appeal, Lewin contends that the sanctions award should be overturned because (1) the goal of pressuring BOI to withdraw or settle the Israeli action was not an improper purpose, and (2) even if such a purpose were improper, the filing of a complaint that is well grounded in fact and warranted by existing law cannot, as a matter of law, furnish a valid basis for the imposition of sanctions. Defendants seek to have sanctions upheld not only on the basis adopted by the district court but also on the grounds that the claims asserted in the complaint were frivolous (*see* defendants' brief on appeal at 9 ("preposterous"), 29 ("plainly foredoomed"), 32 ("patently dismissible")); that the choice of New York as a forum was likewise frivolous because it "lacked any legitimate reason," *id.* at 13 (*see also id.* at 11, 15, 17 (characterizing plaintiffs' legal arguments in favor of that forum as "tenuous," "contrived," and "far-fetched")); and that the court should have awarded sanctions under 28 U.S.C. § 1927 on the ground that the filing of the New York complaint unreasonably and vexatiously multiplied litigation. They also argue that the award of sanctions should have been higher.

We review all aspects of a district court's award of sanctions under an abuse-of-discretion standard, *see, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (Rule 11 sanctions); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991) (inherent power); *Milltex Industries Corp. v. Jacquard Lace Co.*, No. 94-7498, 1995 WL 139895, at *3 (2d Cir. March 31, 1995) (inherent power); *Caisse Nationale de Credit Agricole-CNCA v. Valcorp, Inc.*, 28 F.3d 259, 264 (2d Cir. 1994) (Rule 11); *Knipe v. Skinner*, 19 F.3d 72, 75 (2d Cir. 1994) (Rule 11), giving recognition to the premise that "the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard" that informs its determination as to whether sanctions are warranted, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. at 402. We nonetheless remain mindful that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* at 405; *see Derechin v. State University of New York*, 963 F.2d 513, 516 (2d Cir. 1992); *United States v. International Brotherhood of Teamsters*, 948 F.2d 1338, 1344 (2d Cir. 1991).

Under this standard of review, we find that the imposition of sanctions in the present case constituted an abuse of discretion. The district court erred as a matter of law (a) in concluding that it is improper for an attorney to file a nonfrivolous complaint in a new and proper forum partly as a means of enhancing his client's chances of obtaining the settlement of another pending action, and (b) in concluding that sanctions may be imposed for the filing of a complaint that not only is not found to be frivolous but also wins for the plaintiff a measure of judicially imposed relief.

A. *Rule 11 Sanctions*

The pre-1993 version of Rule 11, which is applicable to the present case, provided that an attorney's signature on a "pleading, motion, or other paper" constituted a certification that

> to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . .

Fed. R. Civ. P. 11 (as amended through 1992). This version of the Rule, with the exception of technical changes, *see* Fed. R. Civ. P. 11 Advisory Notes, was adopted in 1983. Although prior to 1983, Rule 11 contemplated the imposition of sanctions only upon a finding of bad faith, the 1983 revision of the Rule substituted an objective standard of reasonableness. *See generally Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985) ("*Eastway*") (citing Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 195 (1985) ("Schwarzer, *A Closer Look*")), *cert. denied*, 484 U.S. 918 (1987). Applying the new objective standard in *Eastway*, we rejected the notion that an attorney who signed an objectively unreasonable court paper could escape the imposition of sanctions by showing that he had a good faith subjective belief in its validity, *see* 762 F.2d at 253 (attorney's good faith cannot serve as a "safe harbor"); and in *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986) ("*Oliveri*"), *cert. denied*, 480 U.S.

918 (1987), we rejected the proposition that a court paper that was not objectively unreasonable could form the basis for the imposition of sanctions where the attorney was guilty of only a subjective violation of the Rule, *see* 803 F.2d at 1275 ("[r]emoving any subjective good faith component from rule 11 analysis"). *See also Derechin v. State University of New York*, 963 F.2d at 520; *United States v. International Brotherhood of Teamsters*, 948 F.2d at 1344; *Kamen v. American Telephone & Telegraph Co.* 791 F.2d 1006, 1012 (2d Cir. 1986). As discussed below, we conclude that the award of sanctions in the present case did not comply with the objective standard.

1. *Well Grounded in Fact and Law*

Preliminarily, we note our rejection of defendants' attempts to support the award of sanctions on the grounds that the claims asserted in the complaint and the selection of New York as a forum were frivolous. Under the objective standard, in order to warrant an award of Rule 11 sanctions on the basis that a complaint is not well grounded in fact or law, "it must be 'patently clear that a claim has absolutely no chance of success.' " *Oliveri* 803 F.2d at 1275 (quoting *Eastway*, 762 F.2d at 254). Plainly this standard was not met with respect to the claims asserted in the New York complaint, for the district court, as described in Part I.C.2. above, declined to find that they were not well grounded. Rather, the court explicitly refused to address the merits, and dismissed "without prejudice to the merits of plaintiff[s'] claims," thereby allowing them to be pursued in the Israeli action. Moreover, at least one of the conditions imposed by the court precedent to its actual dismissal of the complaint, *i.e.*, that defendants present assurances from the appro-

priate Israeli authorities that Sussman would not be detained in Israel should he go there in connection with the Israeli action, was designed specifically to enable plaintiffs' claims to be assessed on their merits. Accordingly, for purposes of Rule 11 analysis, their claims must be deemed nonfrivolous.

Nor can the award of sanctions be sustained on the ground that plaintiffs selected a forum inconvenient to defendants. To begin with, we are skeptical that the commencement of a suit in an inconvenient forum may be the basis of Rule 11 sanctions where venue was not improper. "Attorneys are not under an affirmative obligation to file an action in the most convenient forum; their only obligation is to file in a proper forum." *Newton v. Thomason*, 22 F.3d 1455, 1463-64 (9th Cir. 1994) (reversing order imposing sanctions "for an 'unnecessary and frivolous' choice of venue," where district court found venue tenuous but not improper). In any event, defendants' assertion that the choice of forum here was without any rational basis lacks support in the district court's findings and in the record. Though the court stated that New York was "a highly doubtful venue," 154 F.R.D. at 70-71, it did not conclude that venue in New York was improper. Nor could it have concluded that there was no objectively reasonable basis for placing venue in New York, for plaintiffs alleged that BOI had used the New York branch of Bank Hapaolim in order to facilitate and conceal from plaintiffs BOI's improper participation in the NAB manipulations. *See* 28 U.S.C. § 1391(d), (f) (1988) (alien may be sued in any district; foreign state may be sued in any district in which a substantial part of events giving rise to the claim occurred). While the court found the branch-bank involvement to be a tangential contact with New York, and found this

and other New York connections sufficiently outweighed by other factors to warrant the court's exercise of its discretion to dismiss for forum non conveniens, that exercise of discretion did not make venue in New York improper.

In sum, far from having found either plaintiffs' claims or their choice of forum frivolous, the court exercised its properly invoked jurisdiction to grant plaintiffs relief designed to ensure their opportunity to have those claims addressed on their merits in the Israeli action. The award of sanctions here cannot be upheld on the basis that the complaint or the choice of forum was not well grounded.

2. *Improper Purpose as Sanctionable*

The question remains whether the court could properly impose sanctions for the filing of a nonfrivolous complaint which resulted in the court's award of some benefits to plaintiffs, on the basis of its finding that plaintiffs also had a purpose that was not proper. This Court has not squarely addressed the question. In one case we stated that "[e]ven if there is an arguable legal and factual basis for a motion, an attorney or party violates Rule 11 by presenting that motion to the court for an improper purpose," *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 831 (2d Cir. 1992); but that statement was dictum, since we overturned the award of sanctions because the challenged motion had a reasonable legal basis and the district court had not found an improper purpose, *see id.* In a later decision in *Knipe v. Skinner*, we expressly declined to reach the question "of whether a complaint that is warranted by existing law may be sanctionable if filed for the improper purpose of harassment," because in that case the complaint both lacked a good faith basis and had been filed to harass. 19 F.3d at 77.

In the article relied on in *Eastway*'s discussion of the 1983 change from a subjective to an objective standard in Rule 11 analysis, Judge Schwarzer emphasized that an objective standard of analysis is required even with respect to whether a filing was made with an improper purpose. *See* Schwarzer, *A Closer Look*, 104 F.R.D. at 195. Thus, the court is not to "delve into the attorney's subjective intent" in filing the paper, but rather should assess such objective factors as

> whether particular papers or proceedings caused delay that was unnecessary, whether they caused increase in the cost of litigation that was needless, or whether they lacked any apparent legitimate purpose. Findings on these points would suffice to support an inference of an improper purpose. The court can make such findings guided by its experience in litigation, its knowledge of the standards of the bar of the court, and its familiarity with the case before it, and by reference to the relevant criteria under the Federal Rules such as those in Rule 1 and Rule 26(b)(1).
>
> It is crucial to the effectiveness of Rule 11 that this approach be followed. Were a court to entertain inquiries into subjective bad faith, it would invite a number of potentially harmful consequences, such as generating satellite litigation, inhibiting speech and chilling advocacy. . . .
>
> . . . .
>
> . . . . If a reasonably clear legal justification can be shown for the filing of the paper in question, no improper purpose can be found and sanctions are inappropriate.

Schwarzer, *A Closer Look*, 104 F.R.D. at 195-96 (footnote omitted).

The courts have expressed somewhat divergent views as to whether an improper purpose can warrant the imposition of sanctions for a nonfrivolous filing. In *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988), the Seventh Circuit stated that "filing a colorable suit for the purpose of imposing expense on the defendant rather than for the purpose of winning" would be sanctionable under Rule 11. Several other Circuits have distinguished between complaints and other court papers, taking the view that, whatever the analysis applicable to motions and other papers filed after the commencement of the litigation, special care must be taken to avoid penalizing the filing of a nonfrivolous complaint, for otherwise a plaintiff who has a valid claim may lose his right "to vindicate his rights in court," *National Association of Government Employees, Inc. v. National Federation of Federal Employees*, 844 F.2d 216, 224 (5th Cir. 1988); *see also Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc) (imposition of sanctions inappropriate for filing of a nonfrivolous complaint "even when the motives for asserting those claims are not entirely pure"); *Burkhart v. Kinsley Bank*, 852 F.2d 512, 515 (10th Cir. 1988) (if complaint filed were not frivolous, "then any suggestion of harassment would necessarily fail").

In *Townsend v. Holman Consulting Corp.*, the Ninth Circuit's analysis was as follows:

> Although the "improper purpose" and "frivolousness" inquiries are separate and distinct, they will often overlap since evidence bearing on frivolous-

> ness or non-frivolousness will often be highly probative of purpose. The standard governing both inquiries is objective. . . . With regard to complaints which initiate actions, we have held that such complaints are not filed for an improper purpose if they are non-frivolous. . . . Since subjective evidence of the signer's purpose is to be disregarded, . . . the "improper purpose" inquiry subsumes the "frivolousness" inquiry in this class of cases. The reason for the rule regarding complaints is that the complaint is, of course, the document which embodies the plaintiff's cause of action and it is the vehicle through which he enforces his substantive legal rights. Enforcement of those rights benefits not only individual plaintiffs but may benefit the public, since the bringing of meritorious lawsuits by private individuals is one way that public policies are advanced. . . . [I]t would be counterproductive to use Rule 11 to penalize the assertion of non-frivolous substantive claims, even when the motives for asserting those claims are not entirely pure.
>
> . . . . [A] determination of improper purpose must be supported by a determination of frivolousness when a complaint is at issue.

Id. at 1362 (footnote omitted).

We are in agreement with the *Townsend* analysis, especially in circumstances such as those present here, where the court not only did not find the claims to be objectively unreasonable but imposed restrictions on defendants in an effort to ensure that plaintiffs would have an adequate opportunity to have their claims adjudicated on the merits. A party should not be penalized for or

deterred from seeking and obtaining warranted judicial relief merely because one of his multiple purposes in seeking that relief may have been improper.

3. *Whether the Criticized Purpose Was Improper*

Finally, we turn to the question of whether the finding that there was an improper purpose was correct. The district court held that the filing of the complaint with a view to exerting pressure on defendants through the generation of adverse and economically disadvantageous publicity reflected an improper purpose. To the extent that a complaint is not held to lack foundation in law or fact, we disagree. It is not the role of Rule 11 to safeguard a defendant from public criticism that may result from the assertion of nonfrivolous claims. Further, unless such measures are needed to protect the integrity of the judicial system or a criminal defendant's right to a fair trial, a court's steps to deter attorneys from, or to punish them for, speaking to the press have serious First Amendment implications. Mere warnings by a party of its intention to assert nonfrivolous claims, with predictions of those claims' likely public reception, are not improper.

Nor do we think it was appropriate for the district court to find that Lewin's prelitigation letters were evidence that the New York complaint was filed for an improper purpose. It is hardly unusual for a would-be plaintiff to seek to resolve disputes without resorting to legal action; prelitigation letters airing grievances and threatening litigation if they are not resolved are commonplace, sometimes with salutary results, and do not suffice to show an improper purpose if nonfrivolous litigation is eventually commenced. Indeed, it would be ironic to hold that Rule 11 sanctions may be awarded

based solely on evidence that the plaintiff has given the defendant a warning that the complaint will be filed unless an allegedly tortious lawsuit is withdrawn, in light of the fact that the current version of Rule 11 itself, *see* Fed. R. Civ. P. 11(c)(1) (effective Dec. 1, 1993), essentially forbids the filing of a motion for sanctions unless the movant has given his opponent a warning that such a motion will be filed if the allegedly sanctionable paper is not withdrawn.

B. *Inherent Power*

A court has the inherent power to supervise and control its own proceedings and to sanction counsel or a litigant for bad-faith conduct. *See, e.g., Chambers v. NASCO*, 501 U.S. at 43-50. While Rule 11 extends only to papers filed with the court, the court's inherent power is broader and would permit the court to impose sanctions on the basis of related bad-faith conduct prior to the commencement of the litigation, *see Chambers v. NASCO*, 501 U.S. at 36, 40-41, 44. Though the imposition of sanctions for bad faith obviously entails an inquiry that is at least in part subjective, we conclude that the court's use of its inherent power in the present case constituted an abuse of discretion, for the court's expressed goal of deterrence was inappropriate with respect to a complaint whose merits were not addressed and whose filing properly led the court to grant some relief to the plaintiffs.

We note that the award of sanctions would have been no more supportable if it had been designed to compensate defendants for attorneys' fees and other expenses. The general American rule is that a prevailing party in federal court litigation cannot recover attorney's fees, *see Alyeska Pipeline Service Co. v. Wilderness*

Society, 421 U.S. 240, 247 (1975), and an exception for bad-faith conduct may be made only where there is " 'clear evidence' that the claims 'are entirely without color *and* made for reasons of harassment or delay or for other improper purposes.' " *Eastway*, 762 F.2d at 253 (quoting *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1088 (2d Cir. 1977)) (emphasis in *Eastway*). Even assuming that defendants could be regarded as the prevailing parties in this controversy whose merits have not been determined, defendants did not meet the exception to the American Rule since they did not persuade the district court that the claims asserted in the New York complaint were without color.

Finally, we note that though defendants sought sanctions under 28 U.S.C. § 1927 as well as under Rule 11 and the court's inherent power, arguing that the filing of the complaint had needlessly and vexatiously multiplied the litigation, the court plainly did not treat the present action as congruent with the Israeli action, for it refused to dismiss the New York action unconditionally and instead granted plaintiffs relief that they had previously been unable to obtain from defendants. In the circumstances, it cannot be concluded that the filing of the New York complaint either was in bad faith or caused "delay that was *unnecessary*" or initiated "litigation that was *needless*" or without "*any* apparent legitimate purpose." Schwarzer, *A Closer Look*, 104 F.R.D. at 195 (noting similarity between § 1927 and purpose element of Rule 11) (emphasis added). The court properly denied defendants' request for an award of sanctions under § 1927.

CONCLUSION

We have considered all of defendants' arguments in support of sanctions and have found them to be without merit. In light of our conclusion that an award of sanctions was improper on any of the bases proffered below, defendants' cross-appeal, arguing that the sanctions should have been more severe, is moot.

So much of the judgment as imposed sanctions against Lewin is reversed. The cross-appeal is dismissed.

Erwin SUSSMAN and Ira Guilden, deceased, By and Through Paul Guilden, His Personal Representative, Plaintiffs,

v.

BANK OF ISRAEL, Ministry of Finance of the Government of Israel, Bank Hapoalim, Ltd., Moses Mandelbaum, Galia Maor, Zeev Eveles, and John Does 1-5, Defendants.

No. 91 Civ. 4091 (CSH).

United States District Court
S.D. New York.

March 29, 1994

Miller, Cassidy, Larroca & Lewin, Washington, D.C. (Nathan Lewin, Seth P. Waxman, Michael J. Barta, of counsel), and Schlam, Stone & Dolan, New York City (Richard H. Dolan, of counsel), for plaintiff Erwin Sussman and plaintiffs' counsel.

Lawrence Iason, Catherine M. Foti, Christopher Gunther, Morvillo, Abramowitz, Grand, Iason & Silverberg, P.C., New York City, for plaintiff Ira Guilden, deceased, by and through and Paul Guilden, his personal representative.

Skadden, Arps, Slate, Meagher & Flom, New York City (Jonathan J. Lerner, Angela G. Garcia, of counsel), for defendants.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Having succeeded in their motion to dismiss the complaint on the basis of forum non conveniens, defendants now move for sanctions against plaintiffs and their counsel under Rule 11, Fed. R. Civ. P., 28 U.S.C. § 1927, and the Court's inherent power. The circumstances of the case are described in this Court's opinion dismissing the complaint, 801 F. Supp. 1068 (S.D.N.Y. 1992), and the *per curiam* affirmance by the Court Of Appeals, 990 F. 2d 71 (2d Cir. 1993). Familiarity with those opinions is assumed.

This is an appropriate case for sanctions under Rule 11, as well as the Court's inherent power to deal with abusive litigation. I base that conclusion upon the manifestly improper purpose which played a significant part in plaintiffs' motivation for filing their complaint.

The 1983 Israeli "Bank Share Crisis" resulted, among other consequences, in the initiation on May 1, 1989 of civil proceedings by North American Bank's Israeli liquidator, an Israeli Government officer, against the bank's foreign shareholders, including Sussman and Guilden. 801 F. Supp. at 1071. The liquidator brought that action in the Jerusalem District Court. It made Sussman and Guilden very unhappy. They wanted the Jerusalem civil action against them to go away. But it did not. By the end of May 1991 the Jerusalem civil action was nearing trial.

Sussman and Guilden consulted the Washington, D.C. law firm of Miller, Cassidy, Larroca and Lewin. Nathan Lewin, Esq., was their principal legal adviser. Mr. Lewin and his firm prepared the complaint in the action at bar. Before filing the complaint in this Court, Mr. Lewin sent identical letters to a number of highly placed Israeli Government officials. His letter dated May 30, 1991 to the Minister of Finance is one of them. It is attached as an appendix to this opinion.

Each letter began with these three paragraphs:

> We represent Erwin Sussman and Paul Guilden, who is the executor of the estate of the late Ira Guilden. This letter is being written to advise you of our intention promptly to file a lawsuit in federal court in the United States against certain agencies of the Government of Israel that have committed fraud against our clients and are currently engaged in a continuing improper effort to harass and extort funds from them.
>
> This in a matter of extreme urgency because, in the absence of any satisfactory resolution of our differences, the lawsuit will be filed in New York within the next ten days. The agencies of the Government of Israel that are engaged in an effort directed against our clients are also pressing a trial in the Jerusalem District Court that is scheduled to begin shortly.

> If this controversy erupts into public view with the filing of our lawsuit and the inception of the Israeli proceeding, it will not only result in a grave injustice to individuals who have been among Israel's most constant and generous supporters, but will seriously damage foreign investment in Israel in the future. The dispute concerns North American Bank, which was liquidated after its Israeli managers engaged in criminal acts that resulted in the loss of millions of dollars.

Mr. Lewin then recited the grievances of Sussman and Guilden at being sued in the Jerusalem civil action. Each letter concluded with these two paragraphs:

> Our clients have heretofore been reluctant to take the step of filing suit because a full airing of this outrageous conduct by the Government of Israel will surely deter many potential foreign investors who might otherwise be interested in lending financial resources to Israel. However, the enormity of this injustice and the relentless prosecution of the case in Jerusalem leaves them no option.
>
> If you believe that discussions on this subject can lead to a fruitful and mutually satisfactory resolution, I am prepared to come to Jerusalem promptly to meet with you.

The message sought to be conveyed by these letters is crystal clear: drop the Jerusalem action against Sussman and Guilden, or they will sue the Israeli Government for fraud in New York, and the attendant publicity will cause economic damage to Israel. That constitutes abuse of the litigation process. I am not persuaded by the quite different interpretations plaintiffs and their counsel seek to place upon counsel's words. Letters, of course, are not pleadings. They do not themselves fall within Rule 11. But these letters furnish powerful evidence of the improper purpose for which this complaint was filed.

One of the recipients of a "Lewin Letter" was the Governor of the Bank of Israel, a defendant in the contemplated action here. An Israeli attorney representing the Bank, I. Amihud Ben-Porath, was in New York when the Governor received Mr. Lewin's letter in Israel. The letter was faxed to Mr. Ben-Porath on June 2, 1991. He telephoned Mr. Lewin. Mr. Lewin sent Mr. Ben-Porath a copy of the draft complaint at the latter's New York Hotel, together with a forwarding letter whose first paragraph read:

> Enclosed is the latest draft of the complaint we intend to file in United States District Court. I have not, in our conversation, overstated my clients' anger at how shabbily they have been treated in Israel, and I hope you appreciate it and are able to communicate this feeling.

Mr. Lewin closed with the sentiment that "[m]aybe we can save both our clients much travail."

Lewin, Sussman, and Guilden met with Ben-Porath at the latter's hotel on June 4. Sussman and Guilden expressed their anger at the Jerusalem suit. Ben-Porath replied that the threatened New York action against the Israeli Government would be regarded as blackmail and thus counter-productive. Ben-Porath Declaration at ¶ 5. Mr. Ben-Porath returned to Israel on June 7 and briefed the Legal Adviser to the Bank of Israel. During the following week, Mr. Ben-Porath had several telephone conversations with Mr. Lewin. Mr. Lewin "insisted that the hearing in Jerusalem be suspended as a condition of not filing the threatened action in New York." *Id.* at ¶ 7. The Jerusalem action was not suspended. In a telephone conversation on June 16, Mr. Lewin told Mr. Porath that the New York action was being filed. *Id.* at ¶ 8.

Mr. Lewin's letters to Israeli government officers contained the prediction (to state it charitably) that commencement of the New York litigation would result in publicity adverse to Israel. That prediction came to pass with Mr. Lewin as a participant. Newspaper articles describing the suit appeared in Israel and the United States. The June 18, 1991 edition of The Jerusalem Post quoted Mr. Lewin as saying that "the case was being pursued in the U.S. despite the fact the matter has been addressed by the Israeli courts, since the bank's foreign investors 'were very badly treated by the Israeli court system.'" The October 31, 1991 edition of The New York Times attributed to plaintiffs the assertion that the Jerusalem civil action against them "is a betrayal of their willingness to respond to [Israel's] pleas for financial support." Mr. Lewin is

then quoted as saying: "The message is that if you lend your name to anything in Israel, you can no longer be sure that some lawyer and court won't come after you with huge liabilities." In considering these statements in the press, I do no violence to Mr. Lewin's First Amendment rights. But they are probative of the improper purpose for which the complaint was filed.

The several defendants moved to dismiss the complaint on the ground of forum non conveniens, arguing that Israel was the proper forum. They also moved to dismiss on various substantive grounds. I granted the forum non conveniens motion and accordingly did not reach the merits. 801 F. Supp. at 1071.

Rule 11, in the form in existence at the pertinent times, mandates a sanction when a pleading "has been interposed for any improper purpose. . ."[1] A trial court also has the "inherent power. . . to assess costs and attorney's fees against either a client or his

---

[1] The 1993 amendments to Rule 11 make the imposition of sanctions discretionary rather than mandatory. I may give the amendments retroactive effect for the purpose of exercising that discretion. *Knipe v. Skinner*, 19 F.3d 72, 78 (2d Cir. 1994). Further retroactive effort would not be allowed if it charged the standards of sanctionable conduct. *Id.* at 78. That question does not arise in the case at bar because both versions of Rule 11 condemns filings for an "improper purpose." In the view I take of the case, I would impose sanctions in the exercise of my discretion, even if they were not mandated.

attorney where a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *United States v. International Brotherhood of Teamsters*, 948 F.2d 1338, 1345 (2d Cir. 1991), citing and quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975). I hold that the filing of a complaint in a highly doubtful venue, for the express purpose of putting pressure on a foreign government to drop or compromise that government's action against the plaintiffs in the foreign nation's courts, furnishes a stark example of improper and oppressive litigation. That proposition seems to me self-evident. I see no need to discuss the many cases cited in the voluminous briefs on this motion. The issue is intensely fact-oriented.

Plaintiffs protest that their purpose in filing the complaint was to secure an American forum for their fraud claims against defendants. They say the purity and fixity of their purpose should be inferred from the vigor with which they litigated their right to do so in this Court and the Court of Appeals. I accept that plaintiffs were also motivated by their forum preference, and that they did not go gently from it. It is commonplace, however, that the law recognizes multiple motives in human behavior. In this case plaintiffs had two motives. One was to pressure the Israeli Government to cease prosecution of the Jerusalem action against them by threatening to file, and eventually filing, a sensational complaint against the Government in New York. The other motive was to obtain American jurisdiction if the threats failed, as in fact they did. The conduct inspired by the first motive was improper.

Accordingly the filing of the complaint at bar is sanctionable under Rule 11 and this Court's inherent power.[2] While some sanction under Rule 11 is mandated, the district courts have discretion to decide who should pay it (client or attorney), as well as the amount and the form.

I decline to sanction the plaintiffs in this case. Where to file an action is essentially a legal decision. Plaintiffs commenced an action in this Court on counsel's advice. Counsel sent the pre-filing

---

[2] Defendants also request sanctions under 28 U.S.C. § 1927. I do not think that section is applicable to this case. It authorizes sanctions against one who "multiplies the proceedings in any case unreasonably and vexatiously. . ." Defendants at bar say that the complaint is sanctionable. A complaint initiates a proceeding; it does not "multiply" an existing one. There is a split in the circuits as to whether an initial pleading falls within § 1927. *See* Joseph, *Sanctions: The Federal Law of Litigation Abuse* (2d ed. 1994) at 383-86. I prefer the stricter construction because "a broader construction can take unnecessary liberties with the statutory language." *Id.* at 387. Joseph suggests that the filing by a plaintiff of a repetitious complaint asserting in a different forum the same claim previously filed in another forum "may be deemed to multiply the proceedings of the original case" so as to fall within § 1927, and "there is no logical reason why the sanction could not be applied by the second court." *Id.* at 385. That rationale does not apply to the instant case, since Sussman and Guilden were defendants in Israel, not plaintiffs.

letters to the Israeli officials. Counsel orchestrated the meeting with Ben-Porath, prefacing it by sending him a draft of the complaint. Plaintiffs did not sign the pleading. They did not sign the letters. Prior to the Supreme Court's decision in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991), the rule in the Second Circuit was "that a represented party was subject to Rule 11 sanctions only upon a showing of subjective bad faith." *Teamsters* at 948 F.2d 1344 n.3. Defendants have not made that showing with respect to Sussman or Guilden. They could share counsel's strategic objective without perceiving that the strategy was improper, as counsel were bound to do with the benefit of professional standards. *Business Guides* changed the Second Circuit rule with respect to parties who sign pleadings or other Rule 11 papers, but left open whether a subjective or objective standard applies to non-signing parties. In the present state of the law, I do not think this is an appropriate case for sanctioning the parties, either under Rule 11 or the Court's inherent power.

The sanction will accordingly fall upon Mr. Lewin, who signed the complaint and devised the strategy. His firm is not subject to a Rule 11 sanction, *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989), and I decline to sanction the firm under my inherent power.

Richard H. Dolan, Esq., of the New York firm of Schlam, Stone & Dolan, also signed the complaint. But the record makes it clear that this firm

acted only as plaintiffs' local counsel and did not participate in the strategy. I will not sanction Mr. Dolan.

I regard the matter as serious. Mr. Lewin is sanctioned in the amount of $50,000, to be paid to counsel for defendants for distribution to defendants in whatever manner they may decide. This amount covers all claims that defendants have asserted in the case. My purpose is to deter, not to fully compensate.[3]

It is SO ORDERED.

---

[3] Thus there will be no separate sanction arising out of plaintiffs' motion to amend the Court's July 17, 1992 opinion and order. I also stress that sanctions are based solely on the improper purpose for filing the complaint. Defendants also claim that a number of sanctionable statements were made in subsequent filings. They all relate to the merits of the underlying claims. I did not reach the merits in dismissing the complaint on forum non conveniens, and decline to expend more judicial resources in exploring them now.

APPENDIX

LAW OFFICES
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.
Washington, D.C. 20037
TELEPHONE
(202)-293-6400
TELECOPIER
(202)-293-1827

May 30, 1991

VIA TELECOPIER

The Honorable Yitzchak Moda'i
Minister of Finance
Office of the Minister of Finance
Israeli Ministry of Finance
Kaplan Street, Building No. 1 (HaKirya)
Jerusalem
Israel

Dear Mr. Moda'i:

We represent Erwin Sussman and Paul Guilden, who is the executor of the estate of the late Ira Guilden. This letter is being written to advise you of our intention promptly to file a lawsuit in federal court in the United States against certain agencies of the Government of Israel that have committed fraud against our clients and are currently engaged in a

continuing improper effort to harass and extort funds from them.

This is a matter of extreme urgency because, in the absence of any satisfactory resolution of our differences, the lawsuit will be filed in New York within the next ten days. The agencies of the Government of Israel that are engaged in an effort directed against our clients are also pressing a trial in the Jerusalem District Court that is scheduled to begin shortly.

If this controversy erupts into public view with the filing of our lawsuit and the inception of the Israeli proceeding, it will not only result in a grave injustice to individuals who have been among Israel's most constant and generous supporters, but will seriously damage foreign investment in Israel in the future. The dispute concerns North American Bank, which was liquidated after its Israeli managers engaged in criminal acts that resulted in the loss of millions of dollars.

Neither Mr. Guilden nor Mr. Sussman, nor any other foreign investor or director was involved in any manner, shape or form in these criminal acts. The foreign investors were, at most, honorary directors of the bank, and it was well known that they were not in a position to engage in active supervision of its activities. Indeed, the foreign investors relied on the Bank of Israel and its inspectors to supervise North American Bank and to insure that its business was run properly.

After North American Bank failed and the foreign investors lost millions of dollars, the Bank of Israel induced the Official Receiver, who is the liquidator of the bank, to initiate a lawsuit against Messrs. Sussman, Guilden, and other foreign investors charging them with negligent direction of the activities of North American Bank. Presentation of evidence in that case in Jerusalem is scheduled to begin on June 9.

If the Receiver were acting in the best interests of North American Bank, he would have brought an action against the Bank of Israel for its dereliction of duty. Indeed, as we recently discovered in reviewing the evidence in the criminal case of Mr. Halperin, the Bank of Israel and its high-ranking officers were parties to a secret arrangement, made by the Ministry of Finance in October 1983, to enable the Israeli management of North American Bank to obtain ten million dollars from a bank in New York City to continue their practice of "visut" and to embezzle additional funds. This heretofore secret transaction will be the focus of the case to be brought in New York.

The case now pending in Jerusalem is the culmination of years in which improprieties at North American Bank were overlooked or deliberately ignored by the Bank of Israel. It is grossly unjust for the Bank of Israel now to shift the blame for its own conduct to individuals who have always supported Israel emotionally and financially and seek to hold these foreign supporters liable, in an amount exceeding 200 million *shekalim*, for the losses caused by the failure of North American.

In addition to the loss of their investments, which amounted to millions of dollars, our clients estimate that they have been forced to spend in excess of one million dollars fighting baseless claims made in the Israeli courts. Our lawsuit in federal court in New York will seek recovery against the Ministry of Finance, the Bank of Israel and individual government officials for these losses and for other harm caused to our clients.

Our clients have heretofore been reluctant to take the step of filing suit because a full airing of this outrageous conduct by the Government of Israel will surely deter many potential foreign investors who might otherwise be interested in lending financial resources to Israel. However, the enormity of this injustice and the relentless prosecution of the case in Jerusalem leaves them no option.

If you believe that discussions on this subject can lead to a fruitful and mutually satisfactory resolution, I am prepared to come to Jerusalem promptly to meet with you.

Sincerely yours,

/s/ Nathan Lewin

Nathan Lewin

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERWIN SUSSMAN and IRA GUILDEN, DECEASED, by and through PAUL GUILDEN, his personal representative, Plaintiffs,

-against-

BANK OF ISRAEL, MINISTRY OF FINANCE OF THE GOVERNMENT OF ISRAEL, BANK HAPOALIM, LTD., MOSES MANDELBAUM, GALIA MAOR, ZEEV EVELES, AND JOHN DOES 1-5, Defendants.

91 Civ. 4091 (CSH)

JUDGMENT

Defendants having moved to dismiss the complaint on the basis of forum non conveniens, and the said motion having come before the Honorable CHARLES S. HAIGHT, U.S.D.J., thereafter the Court having granted defendants' motion to dismiss, and dismissing the complaint without prejudice pursuant to the order, dated September 15, 1992, thereafter defendants having moved for sanctions against plaintiffs and their counsel under Rule 11, F.R.Civ.P., 28 U.S.C. Section 1927, and the Court's inherent power, and the Court thereaf'ter on March 30, 1994, having rendered its memorandum opinion and order (#72964); sanctioning Mr. Lewin in the amount of $50,000.00 to be paid to counsel for defendants for distribution to defendants in whatever manner they may decide, and this amount covers all claims that defendants have asserted in the

case, the Court's purpose is to deter not to fully compensate, it is,

ORDERED, ADJUDGED AND DECREED: That defendants' motion to dismiss on the basis of forum non conveniens be and it is hereby granted, and it is further,

ORDERED, that defendants' motion for sanctions under Rule 11, F.R.Civ.P., be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed without prejudice for the reasons stated in the Court's Order dated September 15, 1992, and it is further,

ORDERED, that Nathan Lewin, Esq., be and is hereby sanctioned in the amount of $50,000.00 to be paid to counsel for defendants, Jonathan J. Lerner and Angela G. Garcia, Esqs., for distribution to defendants in whatever manner they may decide. This amount covers all claims that defendants have asserted in the case. The Court's purpose is to deter, not to fully compensate for the reasons stated in the Court's Memorandum Opinion and Order, dated March 30, 1994.

Dated: New York, New York
April 5, 1994

_____
Clerk

By: _____
Deputy Clerk

Erwin SUSSMAN and Ira Guilden, deceased, By and Through Paul Guilden, His Personal Representative, Plaintiffs,

v.

BANK OF ISRAEL, Ministry of Finance of the Government of Israel, Bank Hapoalim, Ltd., Moses Mandelbaum, Galia Maor, Zeev Eveles, and John Does 1-5, Defendants.

No. 91 Civ. 4091 (CSH).

United States District Court
S.D. New York.

July 17, 1992

Miller, Cassidy, Larroca & Lewin, Washington, D.C. (Nathan Lewin, Seth P. Waxman, Michael J. Barta, of counsel), Schlam, Stone & Dolan, New York City (Richard H. Dolan, of counsel), for plaintiffs.

Skadden, Arps, Slate, Meagher & Flom, New York City (Jonathan J. Lerner, Marco E. Schnabl, John M. Horan, Craig S. Hilliard, Joan K. Martin, Angela G. Garcia, of counsel), for defendants.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Plaintiff Irwin Sussman is a citizen of Sweden and a legal permanent resident of the State of California. Plaintiff Ira Guilden, deceased, was a citizen of the

United States and a resident of the State of New York. Upon his death in November 1984 Paul Guilden, a United States citizen and a resident of New York, became the personal representative of Ira Guilden.

At the pertinent times plaintiffs were two of the principal investors in North American Bank ("NAB"), a financial institution incorporated in Israel in 1977 and liquidated in 1988 by Israeli authorities after the discovery of fraud perpetrated by its Israeli managers. Plaintiffs allege that the demise of NAB caused them to lose the full amount of their investments, $10 million in the case of plaintiff Sussman and $7 million in the case of plaintiff Guilden.

By this action plaintiffs seek to recover those amounts in compensatory damages together with $20 million in punitive damages. The named defendants are the Bank of Israel ("BOI") and the Ministry of Finance of the Government of Israel (the "Ministry"), both agencies of the Government of Israel; Bank Hapoalim, Ltd. ("Hapoalim"), a large Israeli private financial institution which maintains a branch in New York City; Moses Mandelbaum, an Israeli citizen and resident and at the pertinent times Governor of BOI; Galia Maor, an Israeli citizen and resident and at the pertinent times Supervisor of Banks at BOI; Zeev Abeles, an Israeli citizen and resident who is currently Deputy Supervisor of Banks at BOI and at the pertinent times held other offices in that agency.[1] The

---

[1] The complaint spells this defendant's last name "Eveles." The defendant says the proper English transliteration of his Hebrew surname is "Abeles," and I adopt that spelling in this Opinion.

"John Doe" defendants 1-5 are included because plaintiffs allege, upon information and belief, that additional unknown individuals took part in the fraudulent conspiracy alleged in the complaint.

All defendants now move to dismiss the action on the ground of forum non conveniens. In the alternative, defendants move to dismiss the complaint or for summary judgment on various substantive grounds.

Background

The complaint alleges that plaintiffs Sussman and Guilden were in a group of three non-Israeli investors who provided substantial funds in 1977 for the creation of NAB. They did so, they allege, on the basis of representations that BOI would oversee the affairs of NAB and detect and prevent fraud.

The complaint alleges that in October 1983, the Israeli banking industry suffered a nation-wide crisis which came to be known as the "Bank Share Crisis." The crisis involved the precipitous decline in the price of the publicly held shares of Israeli banks, which were traded on the Tel Aviv stock market. The complaint alleges that BOI "among others" ascribed the falling bank share prices to a downward adjustment reflecting the true economic value of bank stock, after prices had been artificially inflated by years of manipulative transactions. Specifically, the manipulative transactions consisted of substantial purchases by a bank, or an individual acting for a bank, of the bank's own stock. Such purchases inflated the trading value of the bank's stock, thereby preserving or

increasing the value of existing shares. They also had the effect of disguising the price at which the bank's stock would trade in honest arm's length transactions. Such manipulative transactions in bank stocks are known in Israel as "visut". Complaint ¶ 25.

The Bank Share Crisis in October 1983 necessitated intervention by the Government of Israel. Trading in bank stocks was temporarily suspended. BOI encouraged banks to enter into an arrangement under which most public holders of bank stock would agree to hold their stock for a stated period, generally six years. In consideration of that forbearance, the stockholders covered by the arrangement were guaranteed the right to redeem their shares, at the conclusion of the prescribed period, for a fixed price equal to its trading value as of the date of the guarantee, which was October 6, 1983. The Government designed this arrangement as a device "to buy time to enable the economic value of the bank shares to catch up with their artificially inflated trading prices." *Id.* at ¶ 25.

The complaint goes on to allege that for unstated reasons, that arrangement, which was applied to "almost all other Israeli banks," was not applied to NAB. Instead, in order to keep the price of NAB's stock artificially inflated without assuming the obligations of a guarantee, the Ministry, BOI, and NAB's Israeli management agreed on a plan whereby U.S. $10 million would be provided by the Ministry through the New York branch of defendant Hapoalim to NAB Holding Corporation, a Luxembourg company owned by the principal shareholders of NAB (including plaintiffs), and controlled in fact by the Israeli managers of NAB. The complaint alleges that when

this secret loan was arranged, defendants knew that the proceeds of the loan would be used by the Israeli managers of NAB, thereby circumventing the prohibition of Israeli law against a bank's purchase of its own shares. Plaintiff Sussman, the complaint alleges, had traveled to Israel in October for the purpose of spending the Jewish holidays in that country. Defendants Mandelbaum and Maor are alleged to have falsely reassured Sussman at a meeting on October 18, 1983 concerning NAB's condition and the integrity of its Israeli management. Sussman told unidentified officials of BOI and the Ministry that in view of those reassurances, he did not intend to sell his shares.

The secret $10 million loan was agreed upon during meetings between representatives of the Ministry, BOI, and NAB's Israeli management on October 19 and 20, 1983. Sussman was not told that the loan was provided to enable stock manipulation to continue. On October 24, 1983 the loan, funded by the Ministry with the knowledge, approval and assistance of BOI, was processed through the New York City branch of Bank Hapoalim to NAB Holding Corp., and thence back to the NAB managers in Israel. Ultimately the Israeli managers of NAB used some of the proceeds to purchase shares of NAB in order to maintain the inflated price of the stock. Complaint at ¶ ¶ 27-34. The complaint further alleges that BOI officials including Maor were warned by BOI regulators that NAB was carrying out a prohibited visut practice, but disregarded that advice. *Id.* at ¶ 37.

Broadening its scope, the complaint goes on to allege a series of acts of fraud and mismanagement by NAB's Israeli managers, Moshe Stern, Josusha

Halperin, and Hadassah Monsah. Episodes are alleged beginning in 1979 and extending through April 1985, at which time NAB had become "hopelessly insolvent." *Id.* at ¶ 51. Unnamed BOI employees, as well as defendant Maor, are charged with failure to respond to warning signals, "and deliberately or recklessly allowing the fraudulent scheme to flourish." *Id.* at 43. BOI took over NAB on August 13, 1985. The official receiver was appointed as liquidator of a court-ordered liquidation of NAB on January 5, 1988. In consequence, plaintiffs have lost the full value of their investments. Criminal prosecutions were begun against Stern, Halperin, and Monsah, together with Samuel Barzel, an attorney for NAB. In addition, on May 1, 1989 the liquidator initiated civil proceedings against NAB's foreign shareholders, including plaintiffs Sussman and Guilden. Sussman and Guilden have filed answers and third-party claims in that civil action, asserting at least some of the claims contained in the complaint at bar.[2]

The complaint at bar asserts five claims against all defendants. The first is for fraud and misrepresentation. The "defendants" (unspecified) are charged with having made false statements of facts to plaintiffs "[o]n October 18, 1983, in Jerusalem, and thereafter," including assurances by "the defendants" that NAB was financially sound and well managed; plaintiff had

---

[2] Notwithstanding plaintiffs' protestations to the contrary, examination of the pleadings shows that both plaintiffs' answers and third-party claims in the Israeli civil action contain allegations of fraud on the part of BOI and others that parallel their allegations at bar.

no cause for concern about their investments; and BOI was exercising diligent oversight over NAB's affairs and had not uncovered any irregularities in the bank's management. These false statements were allegedly made to cover up the secret $10 million loan provided to continue stock manipulation by NAB's managers, and for the purpose of inducing plaintiffs to maintain their NAB investments. Plaintiffs allege that the "defendants" concealed the true facts from plaintiffs until those facts were revealed during Halperin's criminal trial in 1990. Plaintiffs allege they did not know the true facts until they conducted an investigation based upon (the) evidence elicited during Halperin's trial. Complaint at ¶ ¶ 60-64.

The four other claims, also against all defendants, proceed from this same nexus of alleged facts. Those claims are for negligent misrepresentation, concealment, breach of a duty to disclose and restitution.

As noted, all defendants move to dismiss the complaint on the ground of forum non conveniens. They say that the civil courts of Israel furnish the appropriate forum for plaintiff's claims. In the alternative, defendants or some of them assert that the complaint should be dismissed on the grounds of the statute of limitations, sovereign immunity, the act of state doctrine, lack of personal jurisdiction, and failure to plead fraud with the specificity required by Rule 9(b), Fed. R. Civ. P.

If defendants' forum non conveniens motion is well founded, I need not and should not reach the other issues.

Discussion

A district court has broad discretion in deciding whether to dismiss an action on the ground of forum non conveniens. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S.Ct. 252, 266-67, 70 L.Ed.2d 419 (1981); *Maganlal & Co. v. M.G. Chemical Co.*, 942 F.2d 164, 167 (2d Cir. 1991).

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), sets forth private and public interest factors which the district court should consider. Private interests include "the ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining the attendance of willing, witnesses; ... and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 508. Public interest factors include administrative difficulties stemming from court congestion; the interest in having "localized controversies decided at home"; and the interest in having issues of foreign law decided by a foreign tribunal. *Id.* at 508-09. "The central purpose of a forum non conveniens inquiry is to determine where trial will be most convenient and will serve the ends of justice." *Maganlal* at 167. A defendant seeking to dismiss a complaint on forum non conveniens "must demonstrate that an adequate alternative forum exists and that, considering the relevant private and public interest factors set forth in *Gilbert* .... the balance of convenience tilts strongly in favor of trial in the foreign forum." *Id.*

At first blush, the private and public factors in the case at bar would appear to tilt powerfully in favor of

trial of plaintiff's claims in Israel. But plaintiffs stress a number of considerations. They say that their status as an American citizen (Guilden) and an American resident (Sussman) are entitled to considerable deference; that the key operative aspect of the alleged fraud occurred in New York; that New York law governs the case; that the trial will be relatively simple, turning upon the credibility of a few witnesses; and that they cannot get a fair hearing in the Israeli courts. I will consider these contentions in turn.

Citizenship

Piper Aircraft, arising out of a plane crash in Scotland, involved an action brought in federal district court by foreign plaintiffs against American defendants, companies that manufactured the aircraft and its propellers. The district court granted defendants' forum non conveniens motion, having concluded that Scotland was the appropriate forum. The Third Circuit reversed, but the Supreme Court reinstated the district court's judgment. As the Court observed at 454 U.S. at 255, 102 S.Ct. at 265-66, the district court "acknowledged that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum," but also held "that the presumption applies with less force when the plaintiff or real parties in interest are foreign." The Court said that this "distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified," *citing Koster v. Lumberman's Mutual Casualty Co.*, 330 U.S. 518, 524, 67 S.Ct. 828, 831-32, 91 L.Ed. 1067 (1947), for the proposition that "a plaintiff's choice of forum is

entitled to greater deference when the plaintiff has chosen the home forum." *Id.* *Koster* affirmed the forum non conveniens dismissal of a derivative suit brought by a plaintiff policy holder in his home district against an Illinois mutual insurance company alleging breaches of trust in the management of the company's affairs. The Court reached that result, notwithstanding its general observation at 524 that "[i]n any balances of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown."

In the case at bar, the Southern District of New York is not plaintiff Sussman's home forum. Sussman is a Swiss citizen and a California resident. To participate in a trial of his claims, Sussman must travel from California to New York or to Israel. The case is analogous to *Mediterranean Golf, Inc. v. Hirsh*, 783 F. Supp. 835, 842 (D.N.J. 1991), where the district court said:

> In this case, Mediterranean Golf [a co-plaintiff] is a Delaware corporation with its principal place of business in Florida and Jones [the other plaintiff] is a resident of Florida. Therefore, New Jersey is a foreign forum to the Plaintiffs. Accordingly, the plaintiffs' choice of forum is entitled to less deference and the Plaintiffs must make more of a showing of convenience to be accorded the same treatment as a home state plaintiff."

As for co-plaintiff Guilden, Paul Guilden sues in a representative capacity, Ira Guilden having died.

Arguably this dilutes the deference accorded to a home state plaintiff, although the Guilden estate is being administered in New York, an administration that has been delayed by the pendency of the Israeli liquidator's civil action in Israel against the non-Israeli NAB investors.

However, I need not pursue this subject further because, assuming plaintiffs at bar are entitled to array themselves in the fully panoply of a home state litigant, the Supreme Court made it plain in *Piper Aircraft* that this is not a dispositive factor. The Court was careful to observe at 256 n. 23:

> A citizen's forum choice should not be given dispositive weight, however.... Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.
> (citations omitted).

On more than one occasion the Second Circuit has affirmed forum non conveniens dismissal requiring litigation abroad of a claim by an American citizen or a party holding that status. *See Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147 (2d Cir. *en banc*), *cert. denied*, 449 U.S. 890, 101 S.Ct. 248, 66 L.Ed.2d 116 (1980) (suit by American corporation, courts of Trinidad held to be more appropriate forum) *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880 (2d

Cir. 1978) (Iranian citizen enjoyed status of American citizen by treaty, courts of Iran held to be more appropriate forum). In *Alcoa* the Second Circuit said of its decision in *Farmanfarmaian*: "We concluded that American citizenship alone is not a barrier to dismissal on the ground of forum non conveniens and that *Gilbert* still provides the controlling standard." 654 F.2d at 152. *Alcoa* and *Farmanfarmaian* predate *Piper Aircraft*, but I do not understand *Piper Aircraft* to modify forum non conveniens analysis based upon the *Gilbert* factors. Indeed, *Piper Aircraft's* footnote 23 shows that it does not.

Where an American plaintiff chooses to invest in a foreign country and then complains of fraudulent acts occurring primarily in that country, the plaintiff's ability to rely upon citizenship as a talisman against forum non conveniens dismissal is diminished. That common sense proposition is illustrated by *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944 (lst Cir. 1991), *cert. denied*, --U.S.--, 112 S.Ct. 1172, 117 L.Ed.2d 418 (1992). Plaintiff purchased shares of a Canadian corporation in Canada. He commenced an action under United States securities laws for misrepresentations and violations of fiduciary duty, claiming to represent a class of 2,500 American shareholders. The district court dismissed the complaint on forum non conveniens grounds, holding that Canada was the appropriate forum. The First Circuit, beginning its analysis with references to *Piper Aircraft* and *Gilbert*, 946 F.2d at 950, rejected the argument of plaintiff and the SEC as *amicus curiae* that federal securities law "seeks so strongly to protect Americans who bought their shares *abroad* from misrepresentations (or violations of fiduciary duty) primarily taking place

abroad that a court may not require an American shareholder to bring his case abroad in a nation that offers its shareholders roughly equivalent legal protections." *Id.* at 953 (emphasis in original). That reasoning applies to the case at bar *a fortiori*, since plaintiffs assert common law fraud claims, and do not invoke the federal securities laws.

The doctrine of international comity may also militate against litigation in this country when an American citizen has voluntarily conducted business in a foreign country, and parallel litigation is proceeding abroad. Thus in *Cornfeld v. Investors Overseas Services, Ltd.*, 471 F. Supp. 1255 (S.D.N.Y.), *aff'd* 614 F.2d 1286 (2d Cir. 1979), this Court dismissed an indemnity action for the recovery of litigation expenses incurred by an American citizen in his capacity as a former officer and director of a Canadian corporation then undergoing liquidation under Canadian law. Judge Werker dismissed the action in deference to the Canadian proceeding, citing such authorities as *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895), and *Canada Southern Railway v. Gebhard*, 109 U.S. 527, 3 S.Ct. 363, 27 L.Ed. 1020 (1883). He observed at 471 F. Supp. 1255 at 1260-61: "The fact that Cornfeld may be a New York citizen is inconsequential, for Cornfeld voluntarily associated himself with and indeed controlled IOS for many years." The case is analogous to that at bar because NAB is in liquidation in the Israeli courts.

In short, it remains the burden of the defendants at bar to demonstrate that Israel is a more appropriate forum for plaintiffs claims. But plaintiff's American

citizenship and residence do not constitute the powerful, near-decisive factors for which they contend.

The Situs of the Fraudulent Acts

Plaintiffs begin their recitation of facts by saying that this action "arises out of a commercial loan made in New York in October 1983 to the managers of NAB..." Main Brief at 6. From that perception plaintiffs derive a "compelling" public interest in this forum "growing out of the New York transaction." *Id.* at 30.

Contrary to plaintiff's characterization, adopted for tactical purposes, it is far more accurate to say that this action arises out of alleged fraudulent acts and breaches of fiduciary duty occurring entirely in Israel. According to plaintiffs' theory, it was in Israel that the defendants hatched their illegal scheme. It was in Israel that the defendants misled Sussman with respect to their intentions and the true state of NAB's financial health. It was in Israel that NAB's Israeli managers made use of the proceeds of the loan, allegedly in violation of Israeli law. In short, the alleged conspiracy was made in Israel by Israelis for Israeli consumption. The use of its New York branch by one of the defendants, Bank Hapoalim, to route the loan proceeds from Israel to NAB Holding Corp. in Luxembourg and then back to the NAB managers in Israel cannot be regarded, in the overall scheme of things, as other than peripheral. That is so even if this routing of the funds was for the purpose of evading Israeli law. Israel's public interest in this

alleged conduct is far greater than that of the State of New York.

Governing Law

For comparable reasons, I cannot accept plaintiff's contention that "American law, rather than Israeli law governs this action." Main Brief at 35. Plaintiffs rely for that proposition on the fact that they felt the economic impact of defendants' alleged fraud in the United States: California in the case of Sussman, New York in the case of Guilden. Plaintiffs rely upon a line of cases of which *Arneil v. Ramsey*, 550 F.2d 774, 779 (2d Cir. 1977) is typical. *Arneil* was an action for federal securities fraud. Defendant pleaded the statute of limitations. The Second Circuit said of the state of law then existing: "Because the provisions of the federal statute sued upon do not specify a limitations period, this court, in determining whether the action is timely brought, must refer to the statute of limitations of the forum state, New York." 550 F.2d at 779.[3]

For forum non conveniens analysis, the more relevant choice of law question is what constitutes a cause of action, rather than when it must be sued upon (always a forum law question in the absence of a controlling statute). This court must consider New York choice of law rules. However, contrary to

---

[3] On the subject of limitation of actions for federal securities fraud, a great deal of water has subsequently gone over the dam. *See Henley v. Sloan*, 961 F.2d 23 (2d Cir. 1992).

plaintiff's contention, the law of the states where plaintiffs suffered economic loss as the result of defendants' alleged conduct does not furnish the controlling law on the propriety of that conduct.

In *Schultz v. Boy Scouts of America*, 65 N.Y.2d 189, 491 N.Y.S.2d 90, 480 N.E.2d 679 (1985), the New York Court of Appeals referred to the seminal case of *Babcock v. Jackson*, 12 N.Y.2d 473, 481, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963), which held that "controlling effect" must be given "to the law of the jurisdiction, which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation," an approach referred to as "grouping of contacts" and "interest analysis." 65 N.Y.2d at 196, 491 N.Y.S.2d at 94, 480 N.E.2d 679. *Schultz* goes on to observe that the *Babcock* analysis has been modified in certain respects by subsequent New York decisions, decisions which "establish that the relative interests of the domicile and locus jurisdictions in having their laws apply will depend on the particular tort issue in conflict in the case." 65 N.Y.2d at 197-98, 491 N.Y.S.2d at 95, 480 N.E.2d 679. The *Schultz* court then used language which I find particularly instructive in the case at bar:

> Thus, when the conflicting rules involve the appropriate standards of conduct, rules of the road, for example, the law of the place of the tort "will usually have a predominant, if not exclusive, concern" (*Babcock v. Jackson, supra*, 12 N.Y.2d at p. 483, 240 N.Y.S.2d 743, 191 N.E.2d 279; *see*, Restatement [Second] of Conflicts of Law § 145 comment d, at 417-

> 418) because the locus jurisdiction's interest in protecting the reasonable expectations of the parties who relied on it to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future assume critical importance and outweigh any interests of the common-domicile jurisdiction...
> 65 N.Y.2d at 198, 491 N.Y.S.2d at 95-96, 480 N.E.2d 679.

Schultz contrasts such a situation with one "when the jurisdictions' conflict rules relate to allocating losses that result from admittedly tortious conduct," 65 N.Y.2d at 198, 491 N.Y.S.2d at 96, 480 N.E.2d 679.

Plaintiffs at bar allege the torts of fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, and breach of fiduciary duty. In short, plaintiffs challenge the integrity of defendants' conduct. That conduct took place in Israel. Whether or not defendants' conduct was tortious will be measured by the law of Israel. It is that law upon which the parties, plaintiffs and defendants alike, relied in respect of defendants' conduct; and the interest of Israel in applying its law to admonish or prevent similar conduct in the future assumes a critical and, in my opinion, controlling importance in choice of law analysis.

Consistent with that analysis, this Court has regarded the place where the victim of fraud or negligence suffered economic loss as less significant for choice of law purposes than the law of the place by which the defendant's conduct is evaluated. *See, e.g.,*

Guildhall Insurance Co., Ltd. v. Silberman, 688 F. Supp. 910, 913 (S.D.N.Y. 1988) (Edelstein, J.) (diversity action for fraudulent and negligent misrepresentation involving insurance policy issued in New York; "even if Guildhall's alleged injury took place in New Jersey this contact is not a sufficient reason to apply to New Jersey law in this action."); *ACLI Int'l Commodity Servs., Inc. v. Banque Populaire Suisse*, 652 F. Supp. 1289, 1299 (S.D.N.Y. 1987) (Lasker, J.) (in fraud action, split domiciles of New York and Switzerland not controlling where "[a]s to the issues of agency and bank secrecy,...both clearly rooted in Switzerland and involving exclusively Swiss citizens, there is a much greater likelihood that Swiss law will provide the rule of decision.")

In the case at bar whether or not fraud or negligence was committed, or fiduciary or other duties were violated, involves exclusively Israeli citizens who acted (or failed to act) on Israeli soil. Applying New York choice of law principles, I conclude without difficulty that the law of Israel controls the case at bar.

Complexity of the Case

At oral argument counsel for plaintiffs characterized the case as "really quite a simple fraud case" which "will turn on issues of credibility" as between Sussman, Guilden *fils*, other unspecified witnesses in the United States "who assisted" Guilden *pere*, and "those witnesses whom the defense chooses to call." Tr. 32.

I do not think this a realistic appraisal. Plaintiffs' complaint alleges complicated and interrelated acts of fraud and misconduct by numerous Israeli individuals from 1979 through 1985. Fraud is not alleged with the specificity required by Rule 9(b), and if it were not for the forum non conveniens ground I would dismiss the complaint for that reason. But it is apparent that many individuals participated in the events of which plaintiffs complain. For that reason plaintiffs sensibly add five "John Doe" defendants to the six they name; and *quaere*, given the scope of the conspiracy alleged, whether that is sufficient. It is by no means clear that defendants could compel the attendance of all significant participants at a trial in New York. Furthermore, most of the relevant documents, which in the nature of the case must be voluminous, are in Hebrew and accordingly would have to be translated for litigation here.

These are factors which must be considered in forum non conveniens analysis. Judge Weinfeld's opinion in *Fustok v. Banque Populaire Suisse*, 546 F. Supp. 506, 511 (S.D.N.Y. 1982), granting a forum non conveniens motion for dismissal, is worth quoting at some length:

> A significant fact which emphasizes that Switzerland, particularly the Canton of Geneva, is the central location of all material witnesses and documents is the claim by Fustok that his accountants and other representatives unearthed the alleged fraudulent scheme after examining the Geneva records and documents of Banque and Advicorp. The simple fact that will not down is that if, as plaintiff alleges, a

> fraud was perpetrated by switching transactions to the detriment of plaintiff and to the benefit of the defendants, the actors who perpetrated the fraud did so in Geneva. When fraud charges are made, it is desirable that the factfinder have the benefit of demeanor testimony of witnesses who would be available in Geneva and not in the United States.
>
> Apart from the availability of material witnesses in Geneva, the pertinent documentary evidence is also located there. All bookkeeping records of Banque involving the silver transactions are in Geneva or elsewhere in Switzerland. So, too, are the Advicorp accounting documents regarding the transactions, minutes of Advicorp meetings, and correspondence between Advicorp and Banque. Many of the relevant documents are in French, Italian or German and would have to be translated.
> (footnotes omitted).

Comparable factors in the case at bar militate in favor of trial of plaintiffs' claims in Israel.

Whether the Israeli Court Would Be a Fair Forum

Forum non conveniens analysis is not meaningful unless there exists an alternative forum. Ordinarily that requirement is satisfied if the defendant is "amiable to process" in the other jurisdiction. *Gilbert*, 330 U.S. at 506-07, 67 S.Ct. at 842. However, *Piper Aircraft* recognized that in "rare circumstances," where

"the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied." 454 U.S. at 254 n.22, 102 S.Ct. at 265 n.22. *Piper Aircraft* gave as an example a case "where the alternative forum does not permit litigation of the subject matter of the dispute," as in *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.* 78 F.R.D. 445 (Del. 1978), in which the district court refused to dismiss "where alternative forum is Ecuador, it is unclear whether Ecuadorian tribunal will hear the case, and there is no generally codified Ecuadorian legal remedy for the unjust enrichment and tort claims asserted." *Id.*

Absent such a fundamental obstacle to a plaintiff's recovery (which is not suggested at bar), American courts are not prone to characterizing a sovereign nation's courts as "clearly unsatisfactory." International comity plays a part in this context as well. Procedural differences do not rise to that level. "[S]ome inconvenience or the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate." *Shields v. Mi Ryung Constr. Co.*, 508 F. Supp. 891, 895 (S.D.N.Y. 1981). In *Shields* Judge Cannella entered a conditional order of forum non conveniens dismissal requiring an Arizona resident to peruse his claim against a South Korean corporation in the courts of Saudi Arabia. Nor is a foreign tribunal eliminated as an alternative forum because its filing fees require an American plaintiff to reduce its claim for damages. *Diatronics v. Elbit Computers, Ltd.*, 649 F. Supp. 122, 127-28 (S.D.N.Y. 1986), *aff'd*, 812 F. 2d 712 (2d Cir. 1987) (Delaware

corporation required by forum non conveniens dismissal to litigate claim in Israel).

In the case at bar, it cannot be gainsaid that plaintiffs make serious charges, involving a great deal of money, against high officials of the Israeli government. Plaintiffs say that these circumstances will prevent them from obtaining a fair hearing in the Israeli courts, so that Israel cannot be regarded as an alternative forum for forum non conveniens purposes.

Plaintiffs' initial condemnation of the Israeli court system was uncompromising. They said in their Main Brief at 22:

> In short, Israel does not provide an "adequate" alternative forum because, in light of the controversial nature of the plaintiffs' allegations, the Israeli courts will not give them a fair hearing. The Israeli courts are subject to the influence of the government officials and agencies whom the plaintiffs are suing and are unlikely to credit the plaintiffs' allegations of official involvement in *visut* and acquiescence, for purposes of a "cover-up," in bank mismanagement in succeeding years. The *only* judicial forum where this conspiracy of silence can effectively be broken is a federal court in the United States.

Plaintiffs submitted no affidavits from individuals familiar with Israeli courts, or any other evidentiary material, to support that mass indictment of a democratic nation's judicial system. Defendants' reply papers include affidavits from two Israeli law profes-

sors stressing the independence of Israeli judges, who are tenured until the reach they age of 70. Indeed, readers of newspapers are aware of the fact that Israeli courts are entirely capable of making judgments displeasing to those in high civil or military authority.

Plaintiff, in a surreply submission permitted by this Court, offered an affidavit by Kenneth Mann, an Israeli law professor and attorney. The Mann affidavit is more moderate, at least in tone. He argues that the report of the Beisky Commission, established by the Israeli Parliament to investigate the bank shares crisis, and two decisions of the Israeli Supreme Court articulate a "passive bystander thesis" in respect of the BOI and other government officials: a thesis which, in Professor Mann's words, "holds that the commercial banks got away with a scheme of their own doing under the careless eye of the BOI and other government officials, while specifically rejecting the idea that the BOI conspired with the banks to establish and facilitate the *visut*." Affidavit at ¶ 6. Those circumstances, Professor Mann argues, have created a "negative predisposition" against claims that government officials actively participated in misconduct, a phenomenon which "critically weakens the judicial neutrality necessary to a full and balanced consideration in an Israeli court of the... issues so central to the plaintiff's New York suit." *Id.* at ¶ 22. Professor Mann concludes his affidavit by saying:

> While I cannot say with certainty that any particular lower court in Israel will be adversely influenced by what has already happened, it is abundantly clear that, as a matter of institutional due process in civil litigation, the

> plaintiffs' reasons for seeking an alternative forum are well justified.

Id. at ¶ 37.

Any moderation in the plaintiffs' criticism of the Israeli judicial system is more apparent than real. The concept of a "negative predisposition" (unknown in any forum non conveniens jurisprudence) is made up of subjective and objective elements. "Negative" is the subjective element; it reflects plaintiffs' concern that the perceived predisposition disfavors their cause. Presumably defendants, if they acknowledged the existence of a judicial predisposition, would regard it as a "positive" one. But the key word is "predisposition." Plaintiffs say that the circumstances of the case give rise to the existence of a predisposition against them on the part of the Israeli courts.

That is as serious a charge as can be made against a judge. Judges swear an oath to decide cases on the facts and on the controlling law, without fear of or favor to any party, individual or government. Predisposition is "the state of being predisposed," in turn defined as to "make someone inclined to something in advance," *The American Heritage Dictionary of the English Language* (ed. 1976); perhaps in this case, a judicial inclination to reject plaintiffs' claims in advance of hearing and seeing the evidence.

I am not prepared to indulge the assumption that Israeli judges, if presented with plaintiffs' claims, would be so affected by a "negative predisposition" that they would fail faithfully to discharge the solemn duty that lies at the heart of the judicial office. I do

not find it necessary to consider the detailed arguments of counsel with respect to the real meaning of the Beisky Commission report, or whether the two Israeli Supreme Court cases cited by Professor Mann bear directly or indirectly, or to what extent, upon plaintiff's particular claims.[4] I prefer to rest my decision on the ground that plaintiffs' preference for an American court cannot be indulged on the basis of an American judge's speculation that his Israeli colleagues would violate their oaths of office.

The proper inquiry goes to the court system, and not to the particular personalities or claims involved. Chief Judge Weinstein made that point in *Murty v. Aga Khan*, 92 F.R.D. 478 (E.D.N.Y. 1981), in which an American citizen resident in New York sued that formidable and wealthy spiritual and political leader and French citizen the Aga Khan. Judge Weinstein granted a motion to dismiss on forum non conveniens grounds and relegated the plaintiff to the courts of France. In doing so, Judge Weinstein rejected plaintiff's suggestion that he could not get a fair hearing suing the Aga Khan in that country. Relying in part upon that concept of comity which informs my conclusions in the case at bar, Judge Weinstein said at 92 F.R.D. 482:

> Plaintiff's complaints about the influence which defendant can and will bring to bear on the French judicial system--though fervently presented--are not supported. He alleges nei-

---

[4] I do note in passing that plaintiffs do not contend they would be confronted by an Israeli equivalent of res judicata or collateral estoppel.

> ther that the French judiciary is inadequately protected from interference nor that it lacks appropriate procedural safeguards. The adequacy of a foreign forum for purposes of transfer of venue turns not on the status any individual litigant may hold in a foreign society, but on the soundness and procedural fairness of that society's court system.
>
> Principles of comity as well as common knowledge preclude our characterizing the French judicial system as any less fair than our own; the French courts can be expected to protect American litigants.

In the case at bar, plaintiffs' expert Professor Mann is careful to refrain from saying that "any particular lower court in Israel will be adversely influenced" by the circumstances described in his affidavit. Stripped of rhetoric, all his affidavit really says is that he understands why plaintiffs would rather sue on their claims in the United States than in Israel. That is not a sufficient basis for regarding Israel as an inadequate forum. And it will be a black day for comity among sovereign nations when a court of one country, because of a perceived "negative predisposition, " declares the incompetence or worse of another nation's judicial system.

Accordingly I conclude that the particular factors relied upon by the plaintiffs do not overcome the manifest truth that trial of plaintiffs' claims in Israel will be most convenient and will better serve the ends of justice.

Many of the reasons why that is so appear in the preceding discussion. To recapitulate, the Israeli courts constitute an adequate alternative forum for plaintiffs' claims. I reject plaintiffs' contention that they cannot get a fair hearing in the courts of Israel, or that the remedy offered by that forum is clearly unsatisfactory for any reason. Israeli law governs the propriety of defendants' conduct. The vast majority of the witnesses reside in Israel. Plaintiffs have not shown that any witnesses with probative evidence to give reside in New York. Sussman resides in California. Ira Guilden is dead. It is not clear from plaintiffs' vague representations what admissible evidence Paul Guilden or others who knew Ira Guilden would be competent to give. While two Bank of Hapoalim employees are identified as having participated in the transfer of the loan proceeds through the New York branch, the motion papers reveal that one of these has retired to Israel and the other is dead. The great majority of the pertinent documents are in Hebrew. Israel's public interest in the issues raised by these charges dwarfs the public interest of New York, which is minimal. All in all, this is a quintessential case for application of the forum non conveniens doctrine.

Accordingly, and in the exercise of my discretion, I grant defendants' motion and conditionally dismiss the complaint, without prejudice to the merits of plaintiff's claims, on the ground of forum non conveniens. I reach no other issue.

Dismissal is on the following conditions:

(1) That defendants waive any statute of limitations defense under Israeli law that may have arisen since the commencement of the captioned action in this Court; and

(2) That plaintiff Sussman receive written assurances from the appropriate Israeli authorities that he will not be detained in Israel by reason of his traveling to that country to defend against the claims pending against him relating to this matter or to assert the claims embraced in the complaint. I make that condition in order to address a concern expressed on behalf of Sussman on this motion. I direct that an agreement signifying the agreement of the defendants and the Government of Israel to these conditions be filed with this Court within sixty (60) days of the date of this Opinion. Upon the filing of that agreement, the conditional order of dismissal will be made absolute. Discovery is stayed in the interim.

It is SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERWIN SUSSMAN AND IRA GUILDEN, deceased, by and through PAUL GUILDEN, his personal representative, Plaintiffs,

-against-

BANK OF ISRAEL, MINISTRY OF FINANCE OF THE GOVERNMENT OF ISRAEL, BANK HAPOALIM, LTD., MOSES MANDELBAUM, GALIA MAOR, ZEEV EVELES, AND JOHN DOES 1-5, Defendants.

91 Civ. 4091 (CSH)

ORDER OF DISMISSAL

HAIGHT, District Judge:

Having considered the most recent correspondence of counsel, I conclude that the undertakings submitted by defendants are sufficient to satisfy the conditions set forth in the Court's Memorandum Opinion and Order dated July 17, 1992 at slip op. 27.

In that regard, the Court relies upon the representation of Jonathan J. Lerner, Esq. counsel for defendants and an officer of this Court, that he has been authorized by the Bank of Israel to promise that it will comply with the terms of the undertaking in respect of detaining plaintiff Sussman in Israel. *See* Lerner Letter dated September 2, 1992 at 5.

I do not think that plaintiff's professed concerns with respect to the form of these undertakings give rise to ques-

tions of substance. I reach that conclusion not withstanding the opinion expressed by counsel in Israel for plaintiff that "the absence of...certification would likely cause a significant delay in the securing of Mr. Sussman's release" if, contrary to the undertakings given, he was detained in Israel. *See* letter of Joel S. Silber, Esq., dated September 3, 1992. Mr. Silber's concern assumes that the defendants and the Israeli authorities would break the promises which are sufficiently set forth in the present undertakings. I am not prepared to assume that the defendants or the Government of Israel would act contrary to their promises. On the contrary, I indulge the opposite assumption. If I should be disappointed in my expectations by subsequent events, this Court is not without its own equitable powers. If appropriate circumstances arise, plaintiffs may apply to this Court for an order restoring the litigation here *nunc pro tunc*.

As for the undertaking relating to the statute of limitations, the time specified in the last sentence is 120 days.

For the reasons set forth in the Court's Memorandum Opinion and Order dated July 17, 1992, as well as in this Memorandum, the Clerk of the Court is directed to dismiss the complaint as against all defendants, without prejudice to the merits of the plaintiff's claims against any of them, on the ground of *forum non conveniens*.

Dated: New York, New York
September 9, 1992

CHARLES S. HAIGHT, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERWIN SUSSMAN, *et al.*,
Plaintiffs,

-against-

BANK OF ISRAEL, *et al.*,
Defendants.

91 Civ. 4091 (CSH)

MEMORANDUM

HAIGHT, District Judge:

Having considered the most recent correspondence of counsel, and assuming that it is appropriate for this Court to say anything during the pendency of plaintiffs' appeal, I think it clear that plaintiffs' Rule 59(e) motion was denied *sub silentio* by this Court's September 9, 1992 order of dismissal.

Defendants' demand for costs and attorneys' fees will be considered after the Second Circuit has decided the appeal.

Dated: New York, New York
March 8, 1993

CHARLES S. HAIGHT, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1204—August Term 1992

(Argued: March 11, 1993 Decided: April 6, 1993)

Docket No. 92-7981

ERWIN SUSSMAN and IRA GUILDEN, deceased, by and through PAUL GUILDEN, his personal representative,

Plaintiffs-Appellants,

—v.—

BANK OF ISRAEL, MINISTRY OF FINANCE OF THE GOVERNMENT OF ISRAEL, BANK HAPOALIM, LTD., MOSES MANDELBAUM, GALIA MAOR, ZEEV EVELES, and JOHN DOES 1-5,

Defendants-Appellees.

Before:

NEWMAN and CARDAMONE, *Circuit Judges*, and METZNER,* *District Judge*.

---

* The Honorable Charles M. Metzner of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from the September 16, 1992, order of the United States District Court for the Southern District of New York (Charles S. Haight, Jr., Judge) dismissing on grounds of *forum non conveniens* a suit arising out of the activities of an Israeli bank. 801 F. Supp. 1068.

Affirmed.

NATHAN LEWIN, Wash., D.C. (Seth P. Waxman, Michael J. Barta, Miller, Cassidy, Larroca & Lewin, Wash., D.C.; Richard H. Dolan, Schlam, Stone & Dolan, New York, N.Y., on the brief), *for plaintiffs-appellants*.

JONATHAN J. LERNER, New York, N.Y. (Angela G. Garcia, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y., on the brief), *for defendants-appellees*.

PER CURIAM:

This is an appeal from the September 16, 1992, order of the District Court for the Southern District of New York (Charles S. Haight, Jr., Judge) dismissing on grounds of *forum non conveniens* a suit arising out of the activities of an Israeli bank, the North American Bank. The Bank was liquidated by Israeli authorities in 1988. The suit is brought by Erwin Sussman and Ira Guilden, who is deceased and is suing by his personal representative. Sussman and Guilden were founders, shareholders, and directors of the Bank. They claim to have been defrauded

of several millions of dollars that they invested in the Bank. Sussman is a Swiss citizen residing in California; Guilden was a United States citizen, resident in New York.

In a comprehensive opinion, Judge Haight dismissed the suit on grounds of *forum non conveniens*. *Sussman v. Bank of Israel*, 801 F. Supp. 1068 (S.D.N.Y. 1992). He conditioned the dismissal on the defendants' agreeing to waive any Israeli limitations defenses that would not have been available when the complaint was filed in the United States. He also required an undertaking from appropriate Israeli officials that Sussman would not be detained in Israel in connection with a suit by the Bank's liquidator, now pending in Israel, if Sussman traveled there to initiate his own lawsuit against the Bank. Upon compliance with these conditions, the United States suit was finally dismissed.

We review the dismissal ruling under an abuse of discretion standard. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981); *Borden, Inc. v. Meiji Milk Products Co.*, 919 F.2d 822, 827 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2259 (1991). We need not consider the significance of Sussman's Swiss citizenship or California residence since Judge Haight assessed the dismissal motion on the assumption that both plaintiffs were "entitled to array themselves in the full panoply of a home state litigant." 801 F. Supp. at 1073. Judge Haight concluded, applying traditional standards, that this suit was a "quintessential case for application of the forum non conveniens doctrine." *Id.* at 1079. After considering all of appellants' contentions, we are satisfied that the District Judge acted well within his discretion.

Affirmed.